In the Supreme Court

OF THE

United States

OCTOBER TERM, 1946

No. 123

MURIEL C. PISTOLESI,
Petitioner,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Muriel C. Pistolesi, respectfully prays that a writ of certiorari be issued by this Court to review the decision of the United States Circuit Court of Appeals for the Ninth Circuit, and its subsequent order for modification thereof, reversing the

judgment of the United States District Court for the Northern District of California in the sum of $8,674.16 entered upon the verdict of a jury for the petitioner.

OPINIONS BELOW.

The opinion of the District Court is reported in 64 Federal Supplement 427 and is also printed in the Record at pages 33 to 44.

The modified opinion of the Circuit Court of Appeals has not been reported but appears in the Record at page 296.

The original opinion of the Circuit Court of Appeals has not been incorporated in the Record but is set forth herein as Appendix "A".

A petition for rehearing by your petitioner was denied by the Circuit Court of Appeals. It simultaneously ordered a modification of the language of the opinion and added a paragraph precluding a new trial. Such modification order has not been included as part of the Record but is set forth herein as Appendix "B".

JURISDICTION.

The original opinion of the Circuit Court of Appeals for the Ninth Circuit was filed March 7, 1947. The Modification Order and Denial of Petition for Rehearing was filed May 2, 1947. The mandate was stayed until June 14, 1947 pending the filing of this petition for certiorari.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, U.S.C. Section 347(a); 8 F.C.A. Title 28, Section 347(a).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Muriel C. Pistolesi, the petitioner herein, is the widowed beneficiary of Norbert H. Pistolesi, the deceased insured under two life insurance policies issued by the respondent, Massachusetts Mutual Life Insurance Company. Identical double indemnity riders were attached to and incorporated in the policies in consideration of the payment of additional premiums for coverage against death from accidental means.

On September 14, 1941, the Pistolesi family, petitioner, insured and their small son, went sailing with friends on a large yacht, the "Eloise". During the cruise Mr. Pistolesi, perched high on one of the two masts of the vessel, started hand over hand to cross a cable stretched between the masts, 35 to 50 feet above the moving 86 foot hull. After advancing a short distance on the cable he "slipped and fell" (R. 108); "slumped down and twisted around" (R. 132); "twist(ed) and jerk(ed) around" (R. 131), but managed to retain a one handed grip, avoid crashing to the deck below, and recover sufficiently to make his way back to his starting place on the mast. At this point a friend on the deck, who had followed the entire episode in the finder of his camera, snapped a picture.

(R. 131, 133.) After resting on the mast for a time Mr. Pistolesi slid down a cable to the deck and almost immediately complained he "slipped and fell", "thought he was a goner" and was in "terrific pain", whereupon he sat down and rested, being "ghastly white", "lips blue", "covered with heavy beads of perspiration" and "breathing exceptionally hard". (R. 72, 106, 107, 108, 136.) Later in the day he tired easily and was unable to perform his usual gymnastics on paddle boards while in the water with his little boy. (R. 72, 73, 75, 142, 143.) At the conclusion of the trip the petitioner drove him home, he immediately went to bed, and thereafter suffered general weakness and debility, had a drawn countenance, and his feet shuffled as he walked. (R. 72, 107, 108, 136; Trial Court's Opinion, R. 34.) All of the manifestations of a severe heart injury apparent immediately after the accident, blue lips (cyanosis), extreme pallor, labored breathing and profuse perspiration, subsequently reappeared upon any physical exertion, including lifting a dog house (R. 77), getting wood (R. 78), trimming a hedge (R. 78) and at various other times. (R. 159, 182.)

Less than three weeks after the accident Mr. Pistolesi was dead at the age of 39. During the early morning hours of October 5, 1941, he awakened in excruciating pain, Dr. Wagner was called, an ambulance was sent for, but he died before he could be removed to a hospital. His body was cremated two days later in accordance with his previously expressed desires (R. 183); no autopsy was performed; Mrs. Pistolesi did not know of the existence of the insurance policies

until the day after the funeral when a friend, Mr. Ireland, took the policies to her. (R. 183, 116, 129.)

Mr. Pistolesi was considered by every witness who knew him, including respondent's sole lay witness, to have been in exceptionally fine health prior to the trip on the "Eloise". He was a clean living family man of moderate habits, well proportioned, athletic of stature and demeanor, a fine swimmer, boxer, squash and badminton player, skier and yachtsman—unusually vigorous, strong and of great vitality. (R. 67, 139, 155, 157, 158, 224. Respondent's witness R. 218.)

The double indemnity provision in both policies in pertinent part reads as follows:

> "Upon receipt of due proof that the death of the insured occurred * * * as the result of bodily injury effected solely through external, violent, and accidental means, as evidence of which injury (except in case of drowning or of internal injuries revealed by an autopsy) there is a visible contusion or wound on the exterior of the body, and that such death occurred within ninety days after sustaining such injury and as a direct result thereof, independently and exclusively of all other causes * * *"

> "* * * The Company shall have the right and opportunity to examine the body and make an autopsy unless prohibited by law." (R. 83, 87.)

THE VERDICT, JUDGMENT AND OPINION OF THE CIRCUIT COURT OF APPEALS.

The jury found the death of Mr. Pistolesi occurred as the result of bodily injury effected solely through external violent and accidental means.

The District Court in its opinion decisively concurred in this finding of the jury thus:

> "The evidence in this case,—in the Court's opinion,—was clear and convincing that the insured met his death solely through accidental means." (R. 34.)

The jury found under proper instructions of the trial Court that the accidental means injury was evidenced by a visible contusion or wound on the exterior of the body within the meaning and intendments of the policies as a whole.

On a subsequent motion for judgment notwithstanding the verdict or a new trial, the trial Court rendered an informed and comprehensive opinion in which it reviewed the facts, applicable principles of law and pertinent authorities, and sustained the verdict of the jury that the accidental means injury was evidenced by a contusion or wound on the exterior of the body within the meaning and intendments of the policy.

Upon appeal the Circuit Court reversed the petitioner's judgment in an opinion containing such an incomplete and inconsistent statement of facts, and conclusion of law encompassing them, that it ordered a modification of its opinion designed to reconcile the inconsistency and contradiction. In doing so it de-

clined to grant your petitioner's petition for rehearing which had demonstrated such fallacies as one of the grounds requiring reconsideration of the decision. The modification order went further, and, pursuant to Respondent's request by petition for modification, precluded a retrial which the original opinion had not foreclosed.

In denying that rehearing, the Circuit Court declined to decide, as it did in its original decision, the issue which immediately arose and became predominant upon its determination, contrary to that of the jury, that the fatal heart injury was not evidenced by a "contusion" or "wound" within the meaning of the policies. That issue, strenuously urged by the petitioner in response to the Respondent's appeal and again as a primary basis for rehearing, and now for a writ of certiorari by this Court, is:

> Whether the accidental means death from wholly internal injury is encompassed by the double indemnity provisions of the policies where the accident is such that a "contusion" or "wound", as restricted by the Circuit Court's opinion, cannot occur because no external impact, blow or penetration was involved in the fatal accidental violence, *and failure to have an autopsy was excused.*

The double indemnity provisions contain internal injury exceptions from the contusion or wound requirement, reading:

> "* * * (except in cases of drowning or of internal injuries revealed by autopsy) * * *"

QUESTIONS PRESENTED.

The questions presented by petitioner's petition herein for writ of certiorari are:

1. Where a verdict of a jury, based upon appropriate instructions unassailed by the appellate tribunal, has determined liability exists under a general double indemnity provision encompassing all accidental means injuries evidenced by contusions or wounds, can the appellate tribunal decree or order a reversal without deciding the issue of law which takes form upon its arrival at a conclusion opposite to that of the jury; that issue being:

> Whether the fatal accidental means internal injury falls within the policies' exceptive words eliminating the contusion or wound requirement where the injuries are internal— "* * * (*except in cases of drowning or of internal injuries revealed by autopsy*) * * *", and performance of an autopsy is excused?

2. May an Appellate Court arrive at a conclusion opposite to that of the jury simply and exclusively by reliance upon expert opinion testimony as to the meaning of wording in the policies which is the ultimate issue to be decided by the jury in obedience to proper instructions of the trial Court, when a timely objection to its admission is made during the trial?

3. Assuming such opinion testimony was admissible over objection, was it not merely evidence to be weighed subject to the jury's determination as to credibility of the witness and does not an Appellate Court's reversal based primarily on such opinion testimony invade the jury's exclusive historical function

to weigh the evidence and judge the credibility of witnesses?

4. Is not the Circuit Court's decision on the contusion or wound issue contrary to the California rules for construction of insurance policies, contrary to all indications of what the California rule would be, and contrary to the better reasoned Federal and State decisions constituting the weight of authority?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

If it be assumed, arguendo, the errors committed by the Circuit Court in reversing the judgment on the "contusion" or "wound" issue do not require review by this Court, the clause specifically excepting wholly internal injuries from the operation of the "contusion" or "wound" requirement of the double indemnity provision must now be construed, and the intent of its drafters in the light of the entire insurance contract must be passed upon and decided, before affirmance or reversal of the judgment may properly be decreed or ordered. As the matter now stands the petitioner's judgment has been dissipated and she is faced with costs in excess of $1,060.00, on the basis of Respondent's cost bill, exclusive of her own costs, as a result of a determination by the Circuit Court of what, by its decision, has become simply the preliminary issue.

II.

Petitioner's intensive search has disclosed no determination, by this or any Federal Court, of the now

predominant issue which the Circuit Court for the Ninth Circuit has failed to decide, which issue is a most important question of law and one determinative of the rights of innumerable policy holders.

III.

The decision of the Circuit Court on the contusion or wound issue is predicated upon the inadmissible opinion of an expert medical witness, over proper and timely objection of counsel, on the ultimate issue for determination by the jury under appropriate instructions from the trial Court, namely, whether the manifestations of internal injury constituted "contusions" or "wounds" within the intendments of the policies. Part of such testimony is quoted by the Circuit Court in its opinion and is designated by it as "uncontradicted medical testimony".

IV.

If the opinion of the medical expert on the ultimate issue was admissible, it was merely evidence to be weighed by the jury, subject to its prerogative of testing the credibility of the witness, and an invasion of those functions by an appellate tribunal to arrive at a conclusion opposite to that of the jury may not be countenanced.

V.

If the testimony of the expert witness on the ultimate issue should be held to have been properly controlling to the extent that it was incumbent upon the Appellate Court to reverse the verdict, a new trial should be permitted in order to afford the petitioner

an opportunity to refute such opinion evidence, as it is respectfully submitted such has not heretofore been the state of the law.

VI.

The Circuit Court's expressed concept of the California rule for construction of the language of insurance policies recognizes but an isolated segment thereof, and is inconsistent with the rule as a whole as expressed by the great weight of those decisions.

VII.

The Circuit Court's decision is contrary to existing indications of what the holding of the California Courts would be on the contusion or wound issue.

VIII.

There is a severe conflict in the decisions of the various Circuit and District Courts on the contusion or wound issue, and the single case from the 10th Circuit relied upon and followed by the Circuit Court specifically states that it made such decision in the absence of any guidance by the Oklahoma State Court, a situation not paralleled here. There has been no decision of the United States Supreme Court which construes a contusion or wound double indemnity accidental means provision of an insurance policy.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the said opinion and judgment of the said Court in the above entitled cause be reviewed by this Court, and that upon such review, said judgment of the Circuit Court of Appeals be reversed and that petitioner be allowed such other relief as this Court may deem meet and proper in the premises.

Dated, San Francisco, California,
June 9, 1947.

HERBERT W. ERSKINE,
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S. J. H. ALLEN,
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No.

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MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals, as modified (R. 296), has not yet been reported. The opinion of the District Court (R. 33) is reported at 64 Fed. Supp. 427.

The original opinion of the Circuit Court is set forth as Appendix "A" hereto, and the order of modification as Appendix "B".

JURISDICTION.

The grounds upon which jurisdiction of this Court is invoked are stated in the petition at page 2.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in the petition at pages 3 to 5 and in the interests of brevity are not repeated here.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Ninth Circuit erred in its disposition of the appeal:

(1) In deciding only what became the preliminary issue in view of the decision reached;

(2) In failing to decide the ultimately predominant issue which immediately arose upon its decision of what became merely the preliminary issue in view of the decision reached;

(3) In invading the jury's historical function to weigh the conflicting evidence and judge the credibility of witnesses to reach a conclusion contrary to that of the jury (and trial Court);

(4) In relying upon inadmissible expert opinion evidence, over timely objection, on the ultimate issue to be decided by the jury;

(5) In precluding a new trial;

(6) In deciding the issue passed upon contrary to the existing indications of what the ruling of

the State Courts would be, and contrary to the better considered Federal and State decisions;

(7) In construing the language of the policies contra to the State rule of construction.

THE ARGUMENT.

1. AN ISSUE, AS YET UNDETERMINED, MUST BE DECIDED TO SUPPORT EITHER AFFIRMANCE OR REVERSAL.

The opinion of the Circuit Court of Appeals determines only what becomes the preliminary issue once it decides the manifestations of blue lips, extreme pallor, labored breathing, profuse perspiration, loss of vigor, drawn countenance and shuffling gait do not satisfy the "contusion" or "wound" requirement within the intendments of the double indemnity provisions of the policies.

The opinion does not consider, and hence does not determine, what thereupon becomes the predominant and controlling issue—whether the accidental death from wholly internal injuries is encompassed by the double indemnity provisions of the policies where the accident is such that a "contusion" or "wound", as restricted in meaning by the Circuit Court's opinion, cannot occur because no external impact, blow or penetration was involved in the fatal accidental violence.

The double indemnity provisions of these policies contain internal injury exceptions from the contusion or wound requirements, reading:

> "* * * (except in cases of drowning or of internal injuries revealed by an autopsy) * * *"

This specific exception of wholly internal injuries from the operation of the "contusion" or "wound" requirement of the double indemnity clause must now be construed, and the intent of the drafters in the light of the entire insurance contract must be passed upon and decided, before affirmance or reversal may be decreed or ordered.

Performance of an autopsy was excused under the circumstances of this case. Mrs. Pistolesi did not know of the existence of the insurance policies, and consequently of their provisions, until after cremation in accordance with the frequently expressed wishes of her deceased husband, and until the day after the funeral when her friend, Mr. Ireland, delivered them to her. (R. 183, 116, 129.) Both the Federal and California Courts hold such circumstances excuse compliance with autopsy provisions:

Ocean Accident and Guar. Corp. v. Schachner, 70 F. (2d) 28 at 29;

Ellis v. Order of United Commercial Travelers of Amer., 20 Cal. (2d) 290, 295 et seq., 125 P. (2d) 457;

Travelers Ins. Co. v. Welch, 82 F. (2d) 799.

See also

Trueblood v. Maryland Casualty Assn. Co., 129 Cal. App. 102, 18 P. (2d) 90.

The autopsy requirement in the exception being but a "method of proof" of internal injuries (properly so designated by the now Respondent in its argument to the Circuit Court—Appellant's Brief page 10) and that method of proof being excused under the circum-

stances of this case, other evidence of fatal accidental internal injuries establishes double indemnity liability under the exception to the contusion or wound requirement.

The last sentence of the double indemnity provision hereinbefore quoted illustrates beyond question that the autopsy requirement is conditioned upon the nonexistence of a legal prohibition against autopsy, as it expressly provides:

> "* * *. The Company shall have the right and opportunity to examine the body and make an autopsy unless prohibited by law. * * *"

If autopsy is probibited by law the exception in effect reads:

> "* * * (except in case of drowning or of internal injuries revealed by ~~an autopsy~~ *satisfactory proof*) * * *"

and by the same token, if autopsy is excused by the law under the circumstances of the case, as it is here, the exception in effect also reads:

> "* * * (except in case of drowning or of internal injuries revealed by ~~an autopsy~~ *satisfactory proof*)* * *".

Visible marks, signs and manifestations such as blue lips, extreme palor, labored breathing, profuse perspiration, loss of vigor, shuffling gait, and the like, repeatedly have been held sufficient evidence of internal injuries to support double indemnity verdicts where the "contusion" or "wound" issue is not involved. (And by the weight of authority where that issue was

involved, cases infra.) Such proof is held to afford ample and adequate protection to the insurance companies against fraudulent claims, which is the objective of the clause. Many such authorities are collected in 39 A.L.R. 1011 and 49 L.N.S. 1022; 1 Appleman, Insurance Law and Practice, pp. 482 and 487 et seq.; 6 Cooley's Briefs on Insurance, 2nd Ed., pp. 5318, 5316 et seq. A typical case is that of *Horsfall v. Pacific Mutual Life,* 32 Wash. 132, 72 P. 1028, which was followed by the California District Court of Appeal, hearing denied by the Supreme Court, in *Trueblood v. Maryland Assurance Co. of Baltimore,* 129 Cal. App. 102, 108, 18 P. (2d) 90, 92, and reaffirmed by the "contusion or wound or visible mark at the place of injury" case of *Hill v. Great Northern Life Insurance Co.,* 186 Wash. 167, 57 P. (2d) 405 (brain hemorrhage).

Such evidence clearly constitutes satisfactory proof, under the exception to the contusion or wound requirement, as a substitute for the excused autopsy.

An apt illustration of the principle that double indemnity liability is incurred where the fatal accidental means injury is such that no "contusion" or "wound", in the restricted sense adopted by the Circuit Court, could occur because no external impact, blow or penetration was involved, is found in the case of *Lewis v. Brotherhood Accident Co.,* 194 Mass. 1, 7, 79 N.E. 802, 804, from which the following excerpt is quoted:

> "Suppose two persons, each having a policy like this, are accidentally swept overboard from a ship by the same wave. One goes clear and receives no

dental means internal injury sufficient to negative a false or fraudulent claim, double indemnity liability is established under the exception. The forceful dissenting opinion of Circuit Judge Soper in the *Powell* case concludes that where manifestations satisfactorily disclose fatal accidental internal injuries which cannot involve "contusions" or "wounds" in the restricted sense, liability is established without contusion, wound or autopsy, and such dissent is an expression which, without question, lends strong support to a conclusion of liability where there is the additional element in the case that the autopsy requirement is excused.

The *Warbende* case, diametrically opposed to the conclusion reached by the Ninth Circuit Court and the *Stanfield* case, infra, cited and relied on by it, held the contusion or wound requirement satisfied in a sunstroke case almost identical in fact with the *Stanfield* case, and went on to observe in its closing paragraph at page 754:

> "* * *. That is if the internal injuries, which cause death, are revealed by an autopsy it is immaterial whether there be a visible contusion or wound on the exterior of the body. But if there is a visible contusion or wound on the exterior of the body which evidences 'the means', it is immaterial whether internal injuries be revealed by an autopsy or by other satisfactory evidence. The provision 'except in case of drowning or of internal injuries revealed by an autopsy' does not impose a burden upon the claimant, but when there are internal injuries *revealed by an* autopsy the provision relieves the claimant of any disadvantage in making proof of the claim in case

> the 'means' have not caused a contusion or wound on the exterior of the body. Of course, in either case, the plaintiff must establish that the 'bodily injuries' which cause death, are effected solely through external violent and accidental means." (Italics theirs.)

It is respectfully submitted the exception clearly excludes wholly internal injuries, which cannot involve an external impact, blow or penetration, from the contusion or wound requirement. That is the only reasonable and tenable construction of the intention of the insurance company and the language employed by it in drawing up the insurance contract as a whole and the clause specifically exempting internal injuries from the "contusion" or "wound" requirement. The autopsy limitation being excused, other satisfactory proof of accidental internal injury is an adequate substitute creating liability under the internal injury exception. This Honorable Court is respectfully urged to grant the writ of certiorari prayed for to consider and resolve this issue and important question of law, heretofore undecided by this Court or any other United States Court. Upon this issue, which the Circuit Court did not resolve, the evidence is more than sufficient, and there would be no justification for disturbing the jury's verdict. (The insurance doctor himself, in the testimony erroneously relied on by the Circuit Court for reversal, as next hereinafter discussed, testified that pallor and blue lips were evidences of a failing or damaged heart. [R. 239, 240, 241.]) It is also most respectfully submitted it would be extremely unjust for the petitioner to be held to the

The Court. He may answer.

A. May I explain my answer after I make it?

Mr. Healy. The jury is not to be guided by what this man thinks it is, but by what Your Honor instructs them." (R. 169.)

"The Court. The jury has said that it would follow my instructions. He may answer the question.

A. No." (R. 239.)

* * * * * * *

"Q. State whether blue lips are wounds or contusions.

A. Blue lips are not a wound or contusion, not a bruise.

Mr. Healy. I move to strike the answer as not responsive, it can be answered yes or no.

A. The answer is no." (R. 240, Court's Opinion, R. 300.)

* * * * * * *

"Q. State whether profuse perspiration is a wound or contusion.

A. It is a result of over-heating the body or the result of weakness, or a reversible thing not the result of any damage, nor damaging in itself.

Q. Is it a wound or contusion?

A. It is not." (R. 242.)

Under familiar and firmly established principles the opinions of experts on such matters are inadmissible in evidence and should not have been relied upon by the Circuit Court in reversing the judgment. The following expression of this Court in *U. S. v. Spaulding*, 293 U. S. 498, 506, 55 S. Ct. 273, 79 L. Ed. 617, is indicative of the rule:

"The medical opinions that respondent became totally and permanently disabled before his policy lapsed are without weight. Clearly the experts failed to give proper weight to his fitness for naval air service or to the work he performed, and misinterpreted 'total permanent disability' as used in the policy and statute authorizing the insurance. Moreover, that question is not to be resolved by opinion evidence. It was the ultimate issue to be decided by the jury upon all the evidence in obedience to the judge's instructions as to the meaning of the crucial phrase, and other questions of law. The experts ought not to have been asked or allowed to state their conclusions on the whole case. Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469, 472. Schmieder v. Barney, 113 U. S. 645, 648. Fireman's Ins. Co. v. J. H. Mohlman Co., 91 Fed. 85, 88. Mullins Lumber Co. v. Williamson & Brown Co., 255 Fed. 645, 646. Germantown Trust Co. v. Lederer, 263 Fed. 672, 676."

If such opinions were admissible, they were not conclusive "uncontradicted medical testimony" demanding and requiring a reversal of the jury's findings. This principle was fully explored by this Court in the recent case of *Sartor v. Arkansas Gas Corp.,* 321 U. S. 620, 627, 64 S. Ct. 724, 88 L. Ed. 967, and was the predominant factor in the granting of the writ of certiorari and reversal of the judgment therein. The opinion in the *Sartor* case reviews many of the authorities demonstrating the error of the Circuit Court in relying upon such testimony for reversal of the finding of the jury in the instant case. In one of those cited cases, *The Conqueror,* 166

U. S. 110, 133, 17 S. Ct. 510, 41 L. Ed. 937, the following conclusive language is found:

> "In short, as stated by a recent writer upon expert testimony, the ultimate weight to be given to the testimony of experts is a question to be determined by the jury; and there is no rule of law which requires them to surrender their judgment, or to give controlling influence to the opinions of scientific witnesses. (Citing cases.)"

It is respectfully submitted that it is indisputable that the Circuit Court of Appeals has erroneously substituted its conclusion for that of the jury by a usurpation of the jury's exclusive function to weigh the evidence and judge the credibility of this witness whose testimony the jury declined to consider creditable. In doing so, it has also overlooked the firm principle that an Appellate Court must assume as established all the facts that the evidence supporting the plaintiff's claim reasonably tends to prove, and there should be drawn in her favor all the inferences fairly deducible from such facts. Two excerpts from the opinion in *Lavender v. Kurn,* 327 U. S. 645, 652, 90 L. Ed. 692, 696, 66 S. Ct. 740, 743-744, indicate that the Circuit Court has exceeded its own function:

> "* * *. Under these circumstances it would be an undue invasion of the jury's historical function for an Appellate Court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. (Citing cases)."

> "* * *. But, where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts

are inconsistent with its conclusion. And the Appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the Court might draw a contrary inference or feel that another conclusion is more reasonable."

To similar effect:

Amaral v. United Benefit Life, 74 Adv. Cal. App. 217, 221, 168 P. (2d) 482, 485;

U. S. v. Holland, 111 F. (2d) 949, 953;

Old Mutual Benefit v. Francis, 148 F. (2d) 590, 591;

Chapman v. Dewey Lumber Co., 106 F. (2d) 482, 485;

12 *Cyc. Fed. Proc.,* 2d Ed. 254-256.

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3. **THE CIRCUIT COURT HAS ADOPTED RESTRICTIVE DICTIONARY DEFINITIONS OF THE WORDS "CONTUSION" OR "WOUND" WITHOUT REGARD FOR THE RULES OF CONSTRUCTION OF THE LANGUAGE OF INSURANCE POLICIES APPLIED BY THE CALIFORNIA COURTS AND MOST OTHER JURISDICTIONS.**

Even the more conservative of the adverse opinions on the subject have studiously avoided any such expression as that indulged by the Circuit Court in effect limiting double indemnity liability to fatal incidents of violent bodily contact involving external impacts, blows or penetrations. Such a restrictive interpretation violates the fundamental doctrines, almost universally employed by the California Courts and Courts of most other jurisdictions, State and Federal, that where the language of a policy is susceptible of two constructions, that which is most favorable to the insured should be adopted; that any

uncertainties or ambiguities should be resolved liberally in favor of the insured and strictly against the insurer; that a risk fairly within contemplation is not to be avoided by any nice distinction or artificial refinement in the use of words; that every rational indulgence must be shown the assured; that interpretations which will give life, force and effect to the policy should be adopted; that the language must be flexible:

Mar See v. North American Accident Insurance Co., 190 Cal. 421, 424, 213 Pac. 42, 43;

Granger v. New Jersey Insurance Co., 108 C. A. 290, 293, 291 Pac. 698, 700 (hearing denied by Supreme Court);

Nelson v. Washington Fidelity National Insurance Co., 135 C. A. 731, 735, 27 Pac. (2d) 779, 781;

Carl Ingalls Inc. v. Hartford Fire Insurance Co., 137 C. A. 741, 745, 31 Pac. (2d) 414, 416;

Coniglio v. Connecticut Fire Insurance Co., 180 Cal. 596, 599, 182 Pac. 275, 276;

Fageol Truck & Coach Co. v. Pacific Indemnity Co., 18 Cal. (2d) 748, 751, 117 Pac. (2d) 669, 671;

Glickman v. New York Life Insurance Co., 16 Cal. (2d) 626, 635, 107 Pac. (2d) 252, 256;

Frenzer v. Mutual Benefit Health and Accident Ass'n., 27 Cal. App. (2d) 406, 416, 81 Pac. (2d) 197, 202;

Fitzpatrick v. Metropolitan Life Insurance Co., 15 Cal. App. (2d) 155, 158, 59 Pac. (2d) 199, 200;

Narver v. California State Life, 211 Cal. 176, 294 Pac. 393;

Meyerstein v. Great American Insurance Company, 82 Cal. App. 131, 255 Pac. 220.

This Honorable Court, after considering the effect of dictionary definitions, has said:

> "* * *. The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder who is often without technical training and who rarely accepts it with a lawyer at his elbow. So if its language is reasonably open to two constructions, that most favorable to the insured will be adopted. (Cases cited.)" *Aschenbrenner v. U. S. F. & G.,* 292 U. S. 80, 84, 78 L. Ed. 1137, 1140, 54 S. Ct. 590, 592;

and Appleman observes in his work on Insurance Law and Practice, Vol. 1, pp. 462, 463:

> "It is the layman, not the insurance attorney, who is insured; the latter would probably refuse a policy with the wordings now standard in them, knowing the effect which many courts have given thereto."

Other decisions of this Court to similar effect are:

Stipcich v. Metropolitan Life Insurance Co., 277 U. S. 311, 322, 48 S. Ct. 512, 72 L. Ed. 895;

Mutual Life Insurance Co. of N. Y. v. Hurni Packing Co., 263 U. S. 167, 174, 44 S. Ct. 90, 68 L. Ed. 235;

Thompson v. Phoenix Insurance Co., 136 U. S. 287, 10 S. Ct. 1019, 34 L. Ed. 408.

4. THE DICTIONARY DEFINITIONS OF "CONTUSION" OR "WOUND" ADOPTED BY THE CIRCUIT COURT ARE CONTRARY TO ESTABLISHED LEGAL DEFINITIONS OF THE WORDS.

Other Courts have established legal definitions of the words "contusion" and "wound", as used in these policies, which are strikingly at variance with the dictionary definitions adopted in the Circuit Court's opinion, and those definitions lend full support to the considered and advised opinion of the trial judge reported in 64 Fed. Supp. 427, R. 33. Such authorities are:

Mutual Life Insurance Co. v. Schenkat, 62 Fed. (2d) 236;

Warbende v. Prudential Insurance Co., 97 Fed. (2d) 749;

Huss v. Prudential Insurance Co., 37 Fed. Supp. 364;

Robinson v. Masonic Protective Ass'n., 87 Vt. 138, 88 Atl. 531;

Thompson v. Loyal Protective Ass'n., 167 Mich. 31, 132 N. W. 554;

Gasperino v. Prudential Insurance Co., 107 S. W. (2d) (Mo.) 819;

People v. Durand, 307 Ill. 611, 139 N. E. 78.

All of this respectable authority and more is summed up in the following restatement of the editors in 29 Am. Jur., p. 713:

> "The words 'contusion' and 'wound' as thus used have been variously defined. The term 'visible contusion' as used in a provision of a life insurance policy for double indemnity where death occurs as a result of bodily injuries effected

by external, violent, and accidental means, of which there is a visible contusion on the exterior of the body, includes any morbid change in or injury to either the subcutaneous tissue or the skin, which produces markings or discolorations that are visible upon the exterior of the body; and it is immaterial whether the 'visible contusion' results directly from the operation of the external, violent and accidental means upon the exterior of the body or indirectly from internal injuries which are effected by such means. A 'wound' has been defined in law as a lesion of the body, and a lesion is a hurt, loss, or injury, or any morbid change in the structure of organs or parts * * *."

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5. **THE DECISION IS CONTRARY TO THE BETTER CONSIDERED CASES, STATE AND FEDERAL, ON THE "CONTUSION" OR "WOUND" ISSUE.**

The decision of the Circuit Court is in direct conflict with the following opinions of the Federal and State Courts on the contusion or wound issue:

Warbende v. Prudential Ins. Co., 97 F. (2d) 236;

Mutual Life v. Schenkat, 62 F. (2d) 236;

Wiecking v. Phoenix, 116 F. (2d) 90;

Huss v. Prudential Ins. Co., 37 Fed. Supp. 364;

American Nat'l. Ins. Co. v. Fox, 184 S. W. (2d) 937;

Thompson v. Loyal Protective Ass'n., 167 Mich. 31, 132 N. W. 554;

Cavallero v. Travelers Ins. Co., 197 Minn. 417, 267 N. W. 370;

Lewis v. Brotherhood Accident Co., 194 Mass. 1, 79 N. E. 802;

Hill v. Great Northern Life, 186 Wash. 167, 51 P. (2d) 405;

Robinson v. Masonic Protective Ass'n., 87 Vt. 138, 88 Atl. 531;

Masonic Mutual Acc. etc. v. Campbell, 156 Ark. 109, 245 S. W. 307.

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6. **THE CIRCUIT COURT'S DECISION IS CONTRARY TO EXISTING INDICATIONS OF WHAT THE HOLDING OF THE CALIFORNIA COURTS WOULD BE ON THE "CONTUSION OR WOUND" ISSUE.**

In an opinion not ~~disclosing whether~~ involving as the "contusion or wound" limitation ~~was~~ is one of the policy's terms, the California District Court of Appeal (hearing denied by the Supreme Court) held, in *Trueblood v. Maryland Insurance Co.* (129 Cal. App. 102, 108, 18 P. (2d) 90, 92), supra:

> "* * *. It is not necessary that the accidental cause shall leave visible external contusions or abrasions of the body. A bodily injury may be either external or internal. If it becomes the direct exclusive cause of death it creates liability * * *."

In deciding the *Trueblood* case, the California Court cited with approval the *Washington* case of *Horsfall v. Pacific Mutual Life Ins. Co.,* 32 Wash. 132, 72 P. 1028, which was one where the insured died of violent dilation of the heart, the policy providing against coverage if there were "no visible

external marks upon the body (the body itself not being considered such mark) produced at the time of and by the accident."

The Washington Court said:

> "It is also urged that the injuries causing death left no visible external mark, produced at the time of and by the accident, upon the body of the deceased, and therefore the injury was one excepted from the policy. The evidence as stated above shows that immediately after the accident the deceased became deathly pale and sick, his hands and feet became cold, the perspiration stood out on his face and hands. The next day after the accident his skin, which previously had been ruddy, became a bluish gray color, and remained so until his death. These, we think, were visible external marks, and sufficient to bring the case within the terms of the policy. The rule is stated in 1 Cyc. 252 as follows: 'The external and visible sign or mark required by the proviso that the policy will not cover "any injury, fatal or otherwise, of which there is no visible mark upon the body" need not necessarily be a bruise, contusion, laceration, or broken limb; it may be any visible evidence of an internal strain. Nor is it necessary that such evidence be present immediately after the happening of the accident.' (Citing many cases.)"

The Washington Supreme Court later cited the *Horsfall* case in the "contusion, wound or other marks or evidence of injury on the exterior of the body at the place of injury" case of *Hill v. Great Northern Life Ins. Co.*, 186 Wash. 167, 57 P. (2d) 405, in affirming liability for an internal injury

(brain hemorrhage). (Cited with approval by the Ninth Circuit Court of Appeals in the coronary thrombosis case of *Order of United Commercial Travelers of America v. Groves,* 130 F. (2d) 863, 865, note).

Since the California Court cited the *Horsfall* case from Washington with approval, there would appear to be justification for anticipation it would follow the later *Hill* case from that state which also cited the *Horsfall* case in arriving at its conclusion that liability existed.

Therefore, when coupled with the well settled doctrine in California that where the language of a policy is susceptible of two constructions that which is most beneficial to the insured should be adopted, and the numerous contusion or wound cases cited herein, it is reasonable to conclude that every indication leads to the probability that the California Courts would have arrived at a conclusion opposed to that of the Circuit Court on the contusion or wound issue. Consequently the Circuit Court erred in not determining, and following, the indications of what the California decision would be:

Huss v. Prudential Ins. Co., 37 Fed. Supp. 364, 366;

Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct., 817, 82 L. Ed. 1188;

3 *Cyc. of Fed. Proc.* 2d Ed. Sec. 608, p. 91, Sec. 600, pp. 63 et seq.

7. THE CIRCUIT COURT CITES ONLY ONE CASE CONCERNED WITH THE "CONTUSION OR WOUND" ISSUE IN ITS ENTIRE OPINION AND IT IS NOT DETERMINATIVE OF THE ISSUES IN THE INSTANT CASE.

The Circuit Court, in relying exclusively on the case of *Paul Revere Life v. Stanfield* (C.C.A. 10) 151 Fed. (2d) 776, and in asserting its facts are "identical", proceeded under a misapprehension of the legal effect of that decision.

The majority opinion in the *Stanfield* case says in part:

> "* * *. In the absence of any guidance from the Supreme Court of Oklahoma we choose to follow those decisions which hold manifestations such as outlined above insufficient to constitute a wound or contusion upon the exterior of the body."

The dissenting opinion declares:

> "* * *. The trial court's prophecy of what course the Supreme Court of Oklahoma would follow is as good as mine, and I cannot agree to a reversal of its judgment simply because the authorities on the other side of the question appeal to me as most logical and just * * *."

As last above pointed out there are numerous indications by the California Courts for the guidance of the Ninth Circuit Court of Appeals leading to a conclusion on the "contusion or wound" issue contrary to the decision reached. It has also been previously herein demonstrated that the Circuit Court's expressed concept of the California rule for construction of insurance contracts is erroneous.

It has been previously pointed out herein that if the Circuit Court followed the majority's conclusion in the *Stanfield* case on the "contusion or wound" issue (as it did) and if it did nor err in so doing, it was thereupon the Court's obligation and its function to decide the then predominant issue whether the accidental means death from wholly internal injury is encompassed by the double indemnity provisions of the policies where the accident is such that a "contusion" or "wound", as restricted by the Court's opinion, cannot occur because no external impact, blow or penetration was involved in the fatal accidental violence, and failure to have an autopsy was excused.

The facts of the instant case, therefore, are not "identical" with the *Stanfield* case—the issues are not ultimately the same—and the governing legal principles on the further issue are neither decided nor mentioned therein.

For these reasons it is most respectfully submitted the Circuit Court's reliance on that case is unjustified. For the same reasons the now Respondent's contention that the majority opinion therein was controlling was ill founded. For like reasons the contention the now Respondent will in all probability urge upon this Court—that since this Court denied a petition for writ of certiorari in the *Stanfield* case it should also deny such a writ in the instant case—will be unsupportable.

PRAYER.

Wherefore, it is most respectfully submitted a writ of certiorari should issue out of this Honorable Court to the Circuit Court of Appeals for the Ninth Circuit to review its decision herein, as modified, and that upon review the judgment of the Circuit Court be reversed and such other and further relief be afforded the petitioner as this Court shall deem proper.

Dated, San Francisco, California,
June 9, 1947.

HERBERT W. ERSKINE,
Attorney for Petitioner.

M. MITCHELL BOURQUIN,
JOHN J. HEALY,
S. J. H. ALLEN,
of Counsel.

(Appendices "A" and "B" Follow.)

Appendix "A"

In the
United States Circuit Court of Appeals
for the Ninth Circuit

Massachusetts Mutual Life Insurance Company, a corporation, Appellant, vs. Muriel C. Pistolesi, Appellee.	No. 11,349 March 7, 1947

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

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Before: Denman, Healy and Orr, Circuit Judges.
Denman, Circuit Judge.

The Massachusetts Mutual Life Insurance Company appeals from a judgment on a jury's verdict holding it liable under a double indemnity clause of the insurer's policy, payable to the appellee.

On November 2, 1938, the insurer issued to Norbert H. Pistolesi two life insurance policies—one for $5,000 and the other for $2,000. Mr. Pistolesi died on October 5, 1941, and the ordinary benefits payable under the policy have been satisfied. The claim in suit is based on the double-indemnity feature of the policies.

The question here is whether the appellee, the plaintiff below, has maintained her burden of proof that the accident, which we assume caused the death, produced "a visible contusion or wound on the exterior of the body" of the deceased within the policies' provisions that

> "Upon receipt of due proof that the death of the insured occurred * * * as the result of bodily injury effected solely through external, violent, and accidental means, as evidence of which injury (except in case of drowning or of internal injuries revealed by an autopsy) there is a visible contusion or wound on the exterior of the body, and that such death occurred * * * as a direct result thereof, independently and exclusively of all other causes * * *"

On September 14, 1941, three weeks prior to his death, Mr. Pistolesi, aged 39 years, was on board a pleasure yacht, the *Eloise*. He was traveling hand-over-hand suspended from a wire which was strung between two masts of the boat. He reached for the wire with one hand, missed the wire (so that his body swung around), and he held on to the wire with the other hand. Then he went back to the mast and remained there for a few minutes while his photograph was taken by another guest on the boat. Pistolesi then climbed down the mast to the deck.

From that occasion until his death, Pistolesi intermittently complained of pain in his chest, and on physical effort he perspired freely, his face became pale, and his lips were sometimes blue. He lost his customary vigor, he walked in a shuffling manner, at times his breathing was labored, and his countenance was drawn.

Early in the morning of October 5, 1941, he awakened and complained of severe pain. A Dr. Wagner was called, but before Pistolesi could be removed to a hospital he died.

There was no autopsy. The coroner was not notified. The body was cremated on October 7, 1941. The official death certificate signed by Dr. Wagner stated that the immediate cause of death was "acute myocardial failure due to coronary thrombosis—duration one week."

We assume as correct the appellee's contention that the happenings to Pistolesi on the yacht's rigging accidentally caused coronary thrombosis and, as a result, his death. We do not agree with appellee's contention that either mere sweating or paleness of skin or *recurring blueing of the lips of Pistolesi* after such exertion constitutes a "visible contusion or wound on the exterior of the body." Appellee gave no evidence of any wound and we think none of a "contusion."

The California Civil Code, Section 1644, provides that "The words of a contract are to be understood in their ordinary and popular sense." In California, insurance policies are so construed. Cf. Greenberg v. Continental Casualty Co., 24 Cal. App. 2d 506, relying on the dictionary definition of the policy's words. The Supreme Court states of dictionary definitions of the word "passenger" that "While for the purpose of judicial decision dictionary definitions often are not controlling, they are at least persuasive that meanings which they do not embrace are not common." Aschenbrenner v. United States Fidelity & Guaranty Co., 292 U. S. 80, 85.

Webster's New International Dictionary, 2d Ed., defines a "contusion" as "a bruise; and injury attended with more or less disorganization of the subcutaneous tissue and effusion of blood beneath the skin but without breaking the skin." Funk & Wagnall's New Standard Dictionary as

> "1. The act of bruising by striking or pounding, or the state of being so bruised; also a pulverizing by beating or pounding.
>
> 2. Surg. A bruise; an injury, as from a blow with a blunt instrument, that does not make an open wound."

The court recognizes that an injured heart may drive less blood to the lips and that they will appear blue, as they did with the deceased just after his strain on the yacht's rigging. This, however, is no evidence that the lips were contused any more than if they turned blue from a sudden gust of fog laden air.

It is possible that such a heart affliction as here claimed may gradually deposit in the veins and arteries material which will slow the circulation and in time cause a blueing of the lips by such deposit there. It is not necessary to decide whether this would be a contusion. Here the testimony is that the blue lips were seen only immediately after the deceased had descended from the rigging. It is not claimed that he sustained a blow on the lips or that they were swollen.

The uncontradicted medical testimony corresponds with the dictionary definitions. It is

> "Q. State whether blue lips are wounds or contusions?

A. Blue lips are not a wound or contusion, not a bruise.

Mr. Healy. I move to strike the answer as not responsive, it can be answered yes or no.

A. The answer is no.

A. Blueness of the skin is a result of the oxygen content of the blood,—veinous blood is blue and the oxygenized blood is red. When the heart action is insufficient and the blood is not pumped properly and sufficient oxygen does not enter the blood, that imparts a blue color or character to the skin, the blood becomes blue, and that imparts the color to the skin. There is no damage and there is no wound or contusion.

Q. Is there any damage to the subcutaneous tissue?

A. There is not.

Q. In the case of pallor is there any damage to the subcutaneous tissue?

A. There is not.

Q. In case of pallor is there any effusion of blood beneath the skin?

A. No.

Q. In case of blue lips is there any effusion of blood beneath the skin?

A. No."

Our conclusion that appellee's burden of proof of contusion has not been sustained by the evidence of pallor and blue lips is in accord with the decision on the identical facts in the case of Paul Revere Life v. Stanfield (CCA 10), 151 F. 2d 776, 777, where the court construed the same policy provision.

The judgment is reversed.

(Endorsed:) Opinion. Filed March 7, 1947. Paul P. O'Brien, Clerk.

Appendix "B"

United States Circuit Court of Appeals
for the Ninth Circuit

Massachusetts Mutual Life Insurance Company (a corporation), Appellant, vs. Muriel C. Pistolesi, Appellee.	No. 11,349 Order

Upon Appellant's Petition for Modification of Opinion and Decree and Appellee's Petition for Rehearing and Stay of Mandate

Before: Denman, Healy and Orr, Circuit Judges.

It is ordered that the paragraph beginning third on page 3 of the printed copy of our opinion filed herein on March 7, 1947, be modified to read as follows:

> "It is possible that such a heart affliction as here claimed may gradually deposit in the veins and arteries material which will slow the circulation and in time cause a permanent blueing of the lips by such deposit therein. It is not necessary to decide whether this would be a contusion. Here the testimony is that the blue lips appeared only when the deceased physically exerted himself. It is not claimed that he sustained a blow on the lips or that they were swollen."

It is ordered that the last sentence of that opinion be stricken and the following substituted therefor:

"It appears that appellant was entitled to have given to the jury its requested instruction for a verdict in its favor and to have granted its motion for a judgment notwithstanding the verdict. It is now entitled to have vacated the judgment appealed from and to have one entered that plaintiff take nothing by her complaint and for its costs. Central Vermont Railway v. Sullivan, 86 F. 2d 171, 174 (CCA 1); Brennan v. Baltimore & Ohio Railroad Co., 115 F. 2d 555 (CCA 2); Leader v. Apex Hosiery Co., 108 F. 2d 71, 81 (CCA 3); Southern Railway Co. v. Bell, 114 F. 2d 341, 343 (CCA 4); Connecticut Mutual Life Insurance Co. v. Lanahan, 113 F. 2d 935 (CCA 6); Burnet v. Kresge Co., 115 F. 2d 713, 716 (CCA 7); Paul Revere Life v. Stanfield, 151 F. 2d 776 (CCA 10); Baltimore v. Redman, 295 U. S. 654, 661; National City Bank v. Oelbermann, 298 U. S. 638.

"The judgment appealed from is reversed and the cause remanded to the District Court for the action above indicated."

The petition for rehearing is denied.

William Denman,
United States Circuit Judge,
William Healy,
United States Circuit Judge,
Wm. E. Orr,
United States Circuit Judge.

(Endorsed) Filed: May 2, 1947. Paul P. O'Brien, Clerk.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No. 123

MURIEL C. PISTOLESI, also known as MURIEL C. SAVAGE,
Petitioner,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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In the Supreme Court
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OCTOBER TERM, 1947

No. 123

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MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

1. Statement of the case.

Two life insurance policies are involved, aggregating $7,000. The ordinary benefits have been satisfied. The claim of plaintiff is for double indemnity.

The policyholder, Norbert H. Pistolesi, is alleged to have suffered a heart attack while traveling hand-over-hand suspended from a wire strung between two masts of a pleasure yacht. One hand missed the wire so that his body swung around with a sudden lurch and he held on to the wire with his other hand.

Mr. Pistolesi died three weeks later of coronary occlusion. Whether there was a heart attack; whether the attack caused the slip; whether his death resulted, directly or indirectly from pre-existing arterial disease, so that it was not covered by the double-indemnity clause, were questions presented for decision. But they were not decided by the Circuit Court for the reason that the requirements of the policy as to evidence of the alleged injury were not satisfied. On this ground, the Circuit Court held that the plaintiff could not recover. The requirement in question is that the alleged accidental injury be revealed by an autopsy or evidenced by a contusion or wound on the exterior of the body. Neither of these conditions was satisfied. Hence, the insurance company was entitled to judgment.

The plaintiff is the widow of Mr. Pistolesi. Having remarried prior to the trial, she is referred to in the record as Mrs. Savage, and will be so identified in this brief.

Mrs. Savage's statement of the case refers (petition, page 4) to "all of the manifestations of a severe heart injury apparent immediately after the accident, blue lips (cyanosis), extreme pallor, labored breathing and profuse perspiration . . ." But there was no evidence that these were all the manifestations of a severe heart injury, nor as to what manifestations are ordinarily present in the case of such an injury.

Another statement (petition, pages 4-5) that Mrs. Savage "did not know of the existence of the insurance policies until the day after the funeral when a friend, Mr. Ireland, took the policies to her" is in-

accurate. Mrs. Savage testified that at the time of the funeral she knew her husband "had insurance policies, but not what they were or the details" (Transcript, pages 128-129).

We also disagree with Mrs. Savage's assertion (petion, page 6):

> Upon appeal the Circuit Court reversed the petitioner's judgment in an opinion containing such an incomplete and inconsistent statement of facts, and conclusion of law encompassing them, that it ordered a modification of its opinion designed to reconcile the inconsistency and contradiction.

The only changes in the opinion (except with respect to the mandate) appear in one paragraph which is quoted here in its original and modified form.

ORIGINAL	AS MODIFIED
It is possible that such a heart affliction as here claimed may gradually deposit in the veins and arteries material which will slow the circulation and in time cause a blueing of the lips by such deposit there. It is not necessary to decide whether this would be a contusion. Here the testimony is that the blue lips were seen only immediately after the deceased had descended from the rigging. It is not claimed that he sustained a blow on the lips or that they were swollen.	It is possible that such a heart affliction as here claimed may gradually deposit in the veins and arteries material which will slow the circulation and in time cause a permanent blueing of the lips by such deposit therein. It is not necessary to decide whether this would be a contusion. Here the testimony is that the blue lips appeared only when the deceased physically exerted himself. It is not claimed that he sustained a blow on the lips or that they were swollen.

The changes consist of the insertion of the word "permanent" and the correction of the statement as to the occasions on which the blue lips appeared. Else-

where in the opinion in its original form the Court had pointed out that the blueing of the lips was "recurring" (Transcript, page 298).

It should also be noted that in denying the Insurance Company's motion for judgment n. o. v., the District Judge—Hon. Chase Clark of Idaho, sitting pro tempore at San Francisco—filed an opinion in which he unmistakably disclosed that he was in doubt as to the propriety of his decision. In discussing the issue of contusion or wound, he said:

> There is no procedure provided for certifying this question to the United States Circuit Court of Appeals of the Ninth Circuit so that this Court could be advised before ruling on these motions . . . (Tr. p. 41).

2. Summary of Argument.

(a) No ground for certiorari is advanced by the petition (section 3).

(b) The Court has recently denied certiorari in a case involving the identical policy provision, and in which the manifestations were even more extensive than those in the case at bar (section 4).

(c) The contention of petitioner premised on the theory that an autopsy was excused is opposed to the position adopted by the petitioner in the District Court. A writ of certiorari should not be issued to consider a question which is in conflict with the theory advanced by the petitioner at the trial (section 5).

(d) An autopsy revealing an internal accidental injury is an absolute condition to the elimination of the requirement of a contusion or wound.

In pointing out that there was no autopsy, the Circuit Court's opinion disposed of that aspect of the double indemnity clause.

The reason why no autopsy was held is immaterial, and there was no necessity for comment on the subject in the opinion of the Circuit Court (section 6).

(e) The only authority on the point rejects the contention that compliance with the autopsy provision can be dispensed with or excused (section 7).

(f) The Circuit Court's decision that pallor and blue lips do not constitute a contusion or wound is sound in principle and is in accord with all other authority on the point (section 8).

(g) Contrary to the assertions in the petition, there is no case holding that the manifestations exhibited by Mr. Pistolesi constitute a contusion or wound (section 9).

(h) Although the precise question has not been decided in the state courts of California, every indication from that source leads to the conclusion that the provisions of this policy would be held clear, certain and unambiguous, and would be construed to mean precisely what they say without distortion or strain in order to impose liability on the insurance company (section 10).

(i) There was no conflict of evidence on the issue of contusion or wound and, therefore, the determination of the issue was for the Court (section 11).

(j) The Circuit Court properly directed entry of judgment for the insurance company (section 12).

ARGUMENT.

3. No ground for certiorari is advanced by the petition.

Aside from the fact that, as will hereafter appear, the decision of the Circuit Court is correct on the merits, there arises at the threshold of the consideration of the case the limitations set forth in section 5 of rule 38 with respect to issuance of certiorari.

The only question decided by the Circuit Court involves the meaning of the language of a policy of insurance and the application of that language to undisputed physical facts.

There is no special or important reason for review. No important question of local law has been decided. No question of federal law has been decided. Strictly speaking, no question of law is involved, but merely the meaning of the words adequately defined by the dictionaries and thoroughly understood as a matter of popular acceptance.

There is no conflict between the decision in this case and the decision of any other Circuit Court of Appeals. In no other case—federal or state—have the manifestations resulting from a heart attack been held to satisfy the requirements of the "contusion or wound" provision of the double indemnity clause. In two cases in which a heart condition participated in causing death, the manifestations were held insufficient. (*Paul Revere Life v. Stanfield,* 151 Fed. (2d) 776; *Dupee v. Travelers,* 2 N. Y. Supp. (2d) 62, see below). Every decision involving symptoms comparable to those at bar has held that they do not satisfy the requirements of the clause.

Furthermore, since *Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, the law controlling this case is that of California. Even if the Circuit Courts were in disagreement—and they are not—this would not suffice to warrant review. This question was decided in *Ruhlin v. New York Life,* 304 U. S. 202, 206, 82 L. Ed. 1290, 1292-93, where the Court held:

> As to the questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts.
>
> . . . . . .
>
> No decision at the present time could reconcile any "conflict of circuits", or do more than enunciate a tentative rule to guide particular federal courts. Therefore, even assuming that it is adequately presented on the record, we decline to decide the issue of state law.

And, citing the *Ruhlin* case, the Court held in *Huddleston v. Dwyer,* 322 U. S. 232, 237, 88 L. Ed. 1246, 1249:

> . . . ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts.

4. The Court has recently denied certiorari in a case involving the identical policy provision, and in which the manifestations were even more extensive than those in the case at bar.

The following are the manifestations relied on by Mrs. Savage for recovery:

> Pallor or whiteness, blue lips, profuse perspiration, labored breathing, general weakness or de-

bility, drawn countenance, complaints of pain and shuffling walk.

We may at once reject all of these items except pallor or whiteness, blue lips, perspiration and drawn countenance. The others are not even concerned with the appearance of the exterior of the body. As to perspiration and drawn countenance, by no stretch of the imagination can they qualify as a contusion or wound. Hence, the case is reduced to the items of pallor and blue lips.

In *Paul Revere Life v. Stanfield,* 151 Fed. (2d) 776 (C.C.A. 10th Circ.), the manifestations were as follows:

> His clothes were wet with perspiration; he complained of smothering to death and of pains in his arms; his face was a *pale yellow color* and his lips were *blue* and swollen; the pupils of his eyes were dilated, and his eyes were glassy; he vomited blood practically the entire time, and hot fluid flowed from his nose; and just before death occurred his "skin had turned *blue practically all over his body*" (p. 777).*

The immediate cause of Stanfield's death was a "heart block or coronary occlusion" (see transcript of Stanfield record, page 17).

The District Court's judgment in favor of Mrs. Stanfield was reversed with directions to enter judgment for the insurance company.

The Supreme Court denied certiorari (90 Adv. Op. 732, March 25, 1946).

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*Italics supplied unless otherwise indicated.

In the case at bar, there was no swelling of the lips, there was no dilation of the eyes, the skin did not turn blue "practically all over the body." The opinion at bar pointed out particularly that "it is not claimed" that Mr. Pistolesi's lips "were swollen" (Tr. 300).

No adequate reason appears why Mrs. Savage should be accorded relief which was denied Mrs. Stanfield. In fact, the latter presented a much more persuasive showing; nevertheless, certiorari was refused.

5. The contention of the petitioner premised on the theory that an autopsy was excused is opposed to the position adopted by the petitioner in the District Court. A writ of certiorari should not be issued to consider a question which is in conflict with the theory advanced by the petitioner at the trial.

The provision in the policy for revealing an internal injury by an autopsy is an exception from the requirement that the injury must be evidenced by a contusion or wound on the exterior of the body.

The clause reads:

> . . . as evidence of which injury (*except in case of* drowning or of *internal injuries* revealed by an autopsy) there is a visible contusion or wound on the exterior of the body.

The provision for revealing an internal injury by an autopsy contains a privilege extended to the beneficiary to take the case out of the contusion or wound requirement. If the beneficiary does not or cannot avail herself of that privilege, the requirement of a contusion or wound stands and must be complied with.

As we shall hereafter show, this is the only possible construction of the policy. But at this juncture we are concerned with the petitioner's complaint that the Circuit Court did not consider the following contention, viz.: that the autopsy was "excused" and that the contusion or wound requirement is not applicable to the case (brief, pages 15-22).

The conclusive answer to this complaint—aside from its intrinsic lack of merit—is that at the trial in the District Court the petitioner adopted the contrary position and procured the submission of the case to the jury on the theory that the conclusive test was whether Mr. Pistolesi's symptoms constituted a contusion or wound.

Surely, the petitioner cannot reasonably demand the intervention of the Supreme Court by certiorari on the ground that the Circuit Court has failed to consider a point which is in conflict with the position taken by the petitioner at the trial.

The record clearly demonstrates petitioner's position in the trial Court. First, is the statement in the instructions to the jury setting forth Mrs. Savage's claims:

> It is claimed by the plaintiff . . . that as evidence of such injury, there was a visible contusion or wound on the exterior of the body of Norbert H. Pistolesi within the intent and meaning of said policies of insurance (Tr. p. 267-8).

Then the instructions proceed to set forth the "three points of inquiry" into which the case "resolves itself" (Tr. p. 268).

The second point embodies the question whether the injury was "evidenced by a visible contusion or wound within the sense and meaning of the policy" (Tr. 268).

The instructions offered by Mrs. Savage were based on this theory. They appear in the charge to the jury (Tr. p. 270-1) and in the statement of points to be relied on by the insurance company—appellant in the Circuit Court (Items 24-28, Tr. pp. 53-54).

Petitioner's position at the trial as above stated is corroborated by the language of the petition on file in this Court. The petition states:

> The jury found under proper instructions of the trial Court that the accidental means injury was evidenced by a visible contusion or wound on the exterior of the body within the meaning and intendments of the policies as a whole (p. 6).

It follows that the Circuit Court of Appeals was not obliged to give extended consideration to the point now advanced by Mrs. Savage. Hence, for the several reasons above noted, there is no ground for granting *certiorari*.

We proceed now to a discussion of the merits of the contentions advanced by the petitioner.

6. An autopsy revealing an internal accidental injury is an absolute condition to the elimination of the requirement of a contusion or wound.

In pointing out that there was no autopsy the Circuit Court's opinion disposed of that aspect of the double indemnity clause.

The reason why no autopsy was held is immaterial and there was no necessity for comment on the subject in the opinion of the Circuit Court.

The policy requires as the basis of recovery that the accidental injury be evidenced by a contusion or wound on the exterior of the body.

There are two exceptions to this requirement. One is drowning. The other is "internal injuries revealed by an autopsy."

Mr. Pistolesi was not drowned.

His alleged internal injury was not revealed by an autopsy.

Therefore, it became incumbent on Mrs. Savage to show that the injury was evidenced by a contusion or wound.

When the opinion of the Circuit Court of Appeals stated that there was no autopsy (Tr. p. 298), that disposed of the point. The only issue which remained necessary for determination was whether there was a contusion or wound.

Why no autopsy was held is immaterial. There was no duty on the part of the Circuit Court to discuss that subject. There was no logical reason for such discussion.

Petitioner's brief (page 15) describes as "the preliminary issue" the question whether there was a contusion or wound. This places the cart before the horse. The first question is whether the requirement of contusion or wound is eliminated by reason of the fact that the internal injury is revealed by autopsy. If it is, then the conditions of the policy are satisfied. If not, then the contusion requirement governs the case and the injury must be evidenced by a contusion or wound in order to justify recovery.

Under the policy, Mrs. Savage is accorded the right to present certain evidence in order to prove an accidental internal injury. If she has failed to do so, she cannot impose on the insurance company a liability not undertaken in the contract, merely because she has by her own act and without the knowledge of the company, rendered impossible the performance of an essential condition to recovery. It makes no difference that the act of cremation occurred before Mrs. Savage examined the policy.

The company inserted the provision so as to limit the coverage and protect itself from unwarranted claims. If an autopsy had been held, it would have comprised an examination of the coronary arteries. This—in all likelihood—would have disclosed a case of advanced sclerosis demonstrating that the disease was the primary cause of death. No internal injury would have been revealed.

In a true case of fatal accidental injury, there is no danger of cremation without an autopsy. In cases of accidental death, the Health Codes of the various

states require intervention by the appropriate public agency. In California this is the function of the coroner (Health and Safety Code, Section 10425), who is authorized to conduct an autopsy (id., Section 10375, subdivision 22). Thus, any case which is deemed accidental and in which the injury is internal, will be referred to the public authorities. Their conclusions evidenced by an official certificate (id., Section 10551) will be available to assist in settlement of doubt or controversy.

Thus, the Health Code gives complete protection to the beneficiary under the policy even though such beneficiary is ignorant of the terms of the policy (as in this case), or even of its existence.

The reason why no autopsy was held in the case of Mr. Pistolesi was that the attending physician, Dr. Wagner, was of the opinion that the death was from natural causes.

Dr. Wagner signed a death certificate fixing the duration of the myocardial failure at "one week" (T. 112). This would rule out any theory of accidental means, because nearly three weeks intervened between the incident on the boat and the death.

Dr. Wagner did not believe that an accident was involved, or that an injury was a contributing cause of death. If he had so believed, he could not have signed the death certificate. (Health and Safety Code, Section 10400, subdivisions c and d).*

*The provisions of the California Health Code above cited will be set forth in the appendix to this brief.

Conditions set forth in a contract as essential grounds for recovery must be satisfied (*Ogburn v. Travelers,* 207 Cal. 50). Courts cannot make a new contract for the parties merely because one of them has put herself in a position in which she is unable to fulfill the stipulated condition.

If the insurance company had consented to cremation, this might be deemed a waiver of the requirement that the injury be revealed by an autopsy. But the cremation took place two days after death and without the company's knowledge. Mrs. Savage cannot excuse herself from compliance with the contract because by her own act—though unwitting—she made compliance impossible.

In *Mutual Life v. Hess,* 161 Fed. (2d) 1 (C.C.A. 5th Circ.) the Court points out the difference between a provision giving the insurance company the right to make an autopsy, and a provision in which the autopsy is a condition to the coverage. There the body was cremated without knowledge of the provision giving the company the right to an autopsy. But there was no requirement—as in the case at bar—that the injury be revealed by an autopsy. The Court held:

> If this insurance was dependent on a clear condition, Mrs. Hess' ignorance of the condition and her innocence in omitting performance of it would hardly change the contract under which she claims, unless there was waiver or estoppel on the part of the Company. We find a better and more conclusive answer to the Company's position in this, that the quoted stipulation is

> not made a condition of the insurance nor is it declared that an omission to afford the opportunity to examine the body and have an autopsy shall forfeit the insurance or any part of it (p 3).

The end result to which the petitioner's argument leads is that there need be no compliance whatever with the conditions of the double indemnity clause. Thus, Mrs. Savage asks that the conditions should be disregarded—in other words, that the courts should re-write the contract.

The company made an exception to the general requirement of a contusion or wound by agreeing to accept an autopsy report in the case of internal injury.

Mrs. Savage seeks to use this privilege as the means of cancelling all the conditions out of the policy. To accomplish this she relies on the fact that cremation rendered an autopsy impossible. To permit such a result would impose on the company a penalty for its willingness to relax the requirement of a contusion or wound in a case where the injury is internal.

Mrs. Savage's contention based on the theory that an autopsy was excused is so devoid of merit that if the Circuit Court of Appeals had in fact ignored it, the Court would have been fully justified in doing so. But the Court pointed out that "there was no autopsy" (Tr. p. 298). That in itself sufficed to dispose of this aspect of the case.

7. The only authority on the point rejects the contention that compliance with the autopsy provision can be dispensed with or excused.

In *Fidelity Mutual Life v. Powell*, 74 Fed. (2d) 525 (C.C.A. 4th Circ.), involving an identical clause, the company admitted that the insured died of carbon monoxide asphyxiation resulting from accidental means.

On that ground the beneficiary contended that it was unnecessary to show that the injury was revealed by an autopsy. The District Court so ruled. But the judgment was reversed. The Circuit Court held:

> We can take judicial notice of the fact that carbon monoxide asphyxiation results in internal injuries, and that such internal injuries are revealable by autopsy; but in the case of this insured they were not "revealed by an autopsy." This is what is required, in language as plain as any of which our English speech is capable, to take the case out of the requirement of proof of a visible wound or contusion on the exterior of the body. The learned counsel for appellee in their supplemental brief have suggested that the language should be construed to mean "disputed internal injuries revealed by autopsy"; but it would be necessary to interpolate even more than this and to construe the exception as though it read "internal injuries which, if they are disputed, shall be revealed by an autopsy." To give the language either of the suggested interpretations, however, would be to make a different contract for the parties in the light of what we think they ought to have meant, not to construe the perfectly clear language that they have used. (p. 526).
>
> . . . . . .

> Such a requirement is a safeguard against fraud and mistake; and, where the parties have thus provided that the policy shall cover accidental death from internal injuries revealed only in this particular way, it does not cover death resulting from internal injuries not so revealed, no matter how indisputably established. The question is not merely one of proof, but of policy coverage; and the coverage is certainly not extended by an admission that death resulted from a cause which the policy does not cover (p. 527).
>
> . . . . . .
>
> The admission on the trial that insured's death resulted from a cause which could be judicially noticed as an internal injury, not only could not extend the coverage of the policy, *but could not amount to a waiver of the proof of injury required as a condition precedent to recovery.* (p. 527).

Thus, the Powell case holds that the insurance company's admission of an internal accidental injury does not excuse the requirement that it be revealed by an autopsy.

Yet, petitioner asserts (brief, page 19) that the Powell case supports her contention. Obviously, the reverse is true.

Furthermore, in the case at bar the insurance company did not admit that there was an accidental internal injury. This issue was contested at the trial and on the appeal.

Petitioner also cites to this point *Warbende v. Prudential,* 97 Fed. (2d) 749 (C.C.A. 6th Circ.). As

the extract set forth at pages 20-21 of petitioner's brief discloses, there is nothing in the Warbende case to support the theory of excuse from compliance with the requirements of the policy. The case merely decides that either an autopsy or evidence of visible contusion or wound will suffice.

Lewis v. Brotherhood, 79 N. E. 802 (Mass.) cited at pages 18-19 of petitioner's brief is not in point. The case is not concerned at all with the subject of autopsy or the requirement that an internal injury be so revealed. The question there was whether the policy required a contusion or wound in case of drowning. There were two conflicting clauses on the subject. So the Court resolved the conflict in favor of the insured. And in doing so, the Court pointed out that there would be little logic in requiring a wound in a case of drowning.

At page 16 of her brief, petitioner cites several cases to the point that if cremation occurs without knowledge by the beneficiary of the terms of the insurance policy, compliance with the autopsy provisions is excused.

But none of these cases is concerned with the stipulated conditions to coverage. For example, *Ells v. Order of United Travelers,* 20 Cal. (2d) 290, involved the question of forfeiture of the insurance policy. The defendant claimed a forfeiture because of violation of the provision that advance notice be given of an autopsy and cremation. Under the circumstances of the case the Court refused to enforce the forfeiture, relying on the familiar principle:

> It is well settled in this state as well as in other jurisdictions that forfeitures are not favored by either courts of law or equity. (p. 301).

Obviously, a forfeiture clause is entirely different from a provision stipulating the essential conditions to coverage and liability.

Petitioner's brief (page 16) also cites *Trueblood v. Maryland Casualty Co.*, 129 Cal. App. 102. The autopsy aspect of that case is just as remote as that in the *Ells* case. Immediate notice of accidental death was given to the insurance company and instructions were requested. Three days later a representative of the company went to the place where the funeral was held for the purpose of investigation. But he made no request for an autopsy. The Court held that this was a waiver of the company's right to an autopsy and that a forfeiture could not be enforced for failure to comply with a subsequent demand.

Ocean Accident Co. v. Schachter, 70 Fed. (2d) 28, and *Travelers v. Welsh,* 82 Fed. (2d) 799 (cited at page 16 of petitioner's brief) were also cases in which the company sought to forfeit because of non-compliance with the provision for an autopsy on demand. Hence, they are not in point.

The difference between a provision according a right to an autopsy and a condition precedent to coverage and liability is clearly stated in *Fidelity Mutual v. Powell,* 74 Fed. (2d) 525 (C.C.A. 4th Circ.) as follows:

> The contention that, if the company desired an autopsy, it should have demanded one under the

provision of the policy giving it that right, is without force. That provision furnished additional protection to the company in the event of a dispute as to the cause of death in a case covered by the policy; but it did not enlarge the coverage of the policy so as to embrace death from internal injuries not revealed by autopsy, nor did it dispense with the proof required as a condition precedent to recovery (p. 528).

8. The Circuit Court's decision that pallor and blue lips do not constitute a contusion or wound is sound in principle and is in accord with all other authority on the point.

Apt language has been adopted in the policy to ensure that the company will be called upon to pay only in meritorious cases of injury by accidental means where the evidence is such as to leave no room for speculation.

There is nothing unfair or unreasonable in requiring a visible contusion or wound as evidence of the injury in cases where internal injuries are not revealed by an autopsy. Generally, injuries caused by accidental means are attended by lacerations and bruises which are plain and evident.

The words "contusion" and "wound" are readily defined and easily understood. The dictionary definitions are set forth in the opinion of the Circuit Court. The words are neither uncertain nor ambiguous (*Travelers Insurance Co. v. Ansley,* 124 S. W. (2d) 37, 42).

Pallor and blue lips are, obviously, transitory signs. Such changes of color are controlled by the circulation of the blood and its proximity to the surface of

the body. Pallor and blueness are produced by fright, nervousness, or exposure to extremely low temperature, just as a flushed face will be caused by excitement, embarrassment or emotional upset.

These manifestations are called "reversible." They are occasional. They come and go as electric light at the turning of a switch. They are produced by diminution of oxygen in the blood—the manifestation of which is called cyanosis, a derivative of a Greek word meaning blue.

On the other hand, a contusion of the flesh or tissue persists for a substantial period of time. It is not ephemeral. The disintegration of or damage to the tissue must be repaired in order that the affected portion of the body be restored to its normal appearance.

This is clear and unmistakable difference between a contusion and a momentary change of color. Under no conceivable theory can the manifestations involved in the case at bar be held to constitute a contusion or wound.

The decisions of other courts are in complete accord with that at bar.

The *Stanfield* case (151 Fed. (2d) 776 (C.C.A. 10th Circ.) (Cert. denied, 90 Adv. Op. 732) has been cited above.

Other decisions and the manifestations involved are as follows:

Travelers Insurance Co. v. Ansley, 124 S. W. (2d) 37 (Tenn.), second appeal, 173 S. W. (2d) 702: Death from taking poison by mouth:

Manifestations:

A condition of shock, and he had *pallor* and a thready pulse. . . .

His face was *very pale,* and his head was drawn back, and his mouth was wide open and his lips were swollen; that his eyes were glassy, sunk in his head.

. . .

His lips were mighty blue. . . .

His face "was *blue all over.* His lips were dark, real dark *blue,* or *purplish*" (173 S. W. (2d) p. 703).

Judgment on verdict for Ansley reversed and cause remanded on first appeal; on second trial verdict directed for the insurance company and judgment thereon affirmed (p. 703).

Paist v. Aetna, 60 Fed. (2d) 476 (C.C.A. 3rd Circ.): Death from sunstroke.

Manifestations:

"Flushed, sunburned face" (p. 477).

Judgment for the insurance company on a directed verdict affirmed.

Dupee v. Travelers, 2 N. Y. Supp. (2d) 62, affirmed 16 N. E. (2d) 391: Death from sunstroke with acute heart condition.

Manifestations:

"The insured's face and head were *very red* redder than usual, and his face was somewhat swollen" (16 N. E. (2d), p. 392).

Judgment for Dupee vacated and complaint dismissed (id. p. 392).

Bender v. Ridgley Protective Assn., 257 N. Y. Supp. 1004; affirmed by Court of Appeals at 188 N. E. 120: Death from sunstroke.

Manifestations:

> Pale, cold clammy and bathed in profuse perspiration (See Dupee v. Travelers, 2 N. Y. Supp. (2d) 62, 65).

Judgment of the trial Court in favor of the beneficiary "reversed on the law" and complaint dismissed.

Lavender v. Volunteer Life, 157 So. 101 (Miss.): Death resulting from a scuffle.

Manifestations:

> Lavender "began to turn *pale* . . . he turned *deathly pale* and became very sick; that his facial expression reflected that he was suffering from intense pain and his body was drawn with pain . . . after making an incision found his abdomen filled with blood from a ruptured spleen" (p. 103).

Judgment for defendant affirmed.

It would unduly prolong this brief to quote at length from the opinions in the cases cited. Appropriate extracts will be set forth in the appendix.

9. Contrary to the assertions in the petition, there is no case holding that the manifestations exhibited by Mr. Pistolesi constitute a contusion or wound.

In no case has it been decided that the symptoms of a heart attack or coronary occlusion constitute a contusion or wound.

In no case has it been decided that the manifestations of pallor and blue lips—no matter what the cause—constitute a contusion or wound.

Those federal cases cited in the petitioner's brief which discuss this subject hold that the process by which the contusion is produced may be internal. They hold that to satisfy the requirement of a contusion the internal processes must produce morbid changes in or injuries to the subcutaneous tissues or skin which evidence themselves by discolorations on the exterior of the body.

The cases in which the plaintiff prevailed on this theory involved death from carbon monoxide poisoning, sunstroke, or poison taken by mouth.

None of these cases involves a coronary thrombosis or coronary occlusion. In none of them were the manifestations limited to pallor and blue lips—conditions which obviously do not involve any morbid change in or injury to the subcutaneous tissues or skin.

Three of the cases cited by the petitioner (brief, pages 29-31) were decided by the Seventh Circuit Court: *Warbende v. Prudential*, 97 Fed. (2d) 749; *Mutual Life v. Schenkat*, 62 Fed. (2d) 236; and *Wiecking v. Phoenix*, 116 Fed. (2d) 236. Another federal case—*Huss v. Prudential*, 37 Fed. Supp.

364—was decided by the District Court of Connecticut.

The *Warbende* case involved carbon monoxide poisoning.

The *Schenkat* case involved poison taken by mouth.

The *Wiecking* and *Huss* cases involved sunstroke.

In the *Wiecking* case the manifestations are not mentioned. In the *Warbende, Schenkat* and *Huss* cases the decision is based on the presence of large scarlet or blue blotches over the surface of the body, which were caused by decomposition of tissue cells producing a morbid change in the subcutaneous tissue.

The leading case on this point is *Warbende v. Prudential.* There medical testimony explained the process by which the cells were decomposed and the morbid injury to the subcutaneous tissue produced. The testimony clearly demonstrated that there was such morbid injury and the Court held that this sufficed.

In the case at bar there was no such testimony and no such manifestation. The only testimony on the subject—and it was uncontradicted—was to the contrary. The insurance company's medical expert explained that the pallor and blue lips exhibited by Mr. Pistolesi did not involve any injury to the subcutaneous tissue or skin or any effusion of blood beneath the skin (Tr. 239-41).

In the *Warbende* case the blotches on the body—produced by morbid injury to the subcutaneous tissue—were persistent and lasting. Such manifestations continue until death. The poison in the system pro-

duces a physiological deterioration which works its way to the surface of the body. There is no such process in the case of a heart attack such as Mr. Pistolesi sustained.

If the Court should care to verify the foregoing analysis, the appendix to this brief may be consulted. There the pertinent portions of the Warbende opinion are set forth.

As to the other cases cited by petitioner (brief, pages 29-31) to support the contention that pallor and blue lips constitute a contusion or wound, the policy provisions, the manifestations involved, and the reasoning of the courts, will be set forth in the appendix to this brief. It will there be demonstrated that none of these decisions is in point.

One of these citations—*Gasperino v. Prudential,* 107 S. W. (2d) 819 (Mo.), (see petitioner's brief, page 29)—need not be considered because the opinion of the Kansas City Court of Appeals was later quashed by the Supreme Court of Missouri *(State ex rel. Prudential v. Shain,* 127 S. W. (2d) 675.)

10. Although the precise question has not been decided in the state courts of California, every indication from that source leads to the conclusion that the provisions of this policy would be held clear, certain and unambiguous, and would be construed to mean precisely what they say without distortion or strain in order to impose liability on the insurance company.

The principles governing the interpretation of insurance contracts have been squarely adjudicated by the California courts.

There are some jurisdictions in which undue effort is made to find ambiguity in language that is clear and plain. In those states insurance contracts and their text are strained and distorted so as to find ground to justify liability. The process is not one of interpretation, but one of unjust enrichment of the policyholder, or his beneficiary, at the expense of the insurance company—or in the case of a mutual company (such as defendant), at the expense of the other policyholders.

The Supreme Court of California has vigorously opposed this trend. In *Blackburn v. Home Life Insurance Co.*, 19 Cal. (2d) 226, it was held:

> Because contracts of insurance are not the result of negotiation and are generally drawn by the insurer, any uncertainties or ambiguities therein are resolved most strongly in favor of the insured (citing cases). Where there is no ambiguity, however, courts will indulge in no forced construction against the insurer, and the insurance policy, like any other contract, is to be interpreted according to the intention of the parties as expressed in the instrument in the light of the circumstances surrounding its execution (p. 229).

The California Supreme Court has also recognized the right of an insurance company to determine the kind of contract it will make and to have that contract enforced according to its terms. This principle was applied in *Coit v. Jefferson Standard Life*, 28 Cal. (2d) 1. There the Court quoted from a Missouri case as follows:

> The insurance company has the right to decide the kind of a contract it will enter into (p. 8).

The *Coit* case is the most recent expression of opinion of the California Supreme Court concerning the interpretation of insurance contracts. The majority opinion (in which six out of seven justices concurred) closes with a quotation of the language from the *Blackburn* case (19 Cal. (2d) 226, 9) which is set forth above, and which warns the courts of the state against indulgence in forced construction against the insurer, if no ambiguity exists.

The single dissenting justice in the *Coit* case charges the majority with adopting a "more conservative view"—a comment which should be helpful to the federal courts in the exercise of their function to expound the law of California.

It is noteworthy that the U. S. Supreme Court has declared the same principle in *Bergholm v. Peoria Life Insurance Co.*, 284 U. S. 489, 76 L. Ed. 416. After explaining the reason for resolving ambiguities in favor of the policyholder, the Court held:

> . . . This canon of construction is both reasonable and just, since the words of the policy are chosen by the insurance company; but it furnishes no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, by forcing from plain words unusual and unnatural meanings.
>
> Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense. . . . And to discharge the insured from the legal consequences of a

> failure to comply with an explicitly stipulated requirement of the policy, constituting a condition precedent to the granting of such relief by the insurer, would be to vary the plain terms of a contract in utter disregard of long settled principles (76 L. Ed. 419).

The courts of California refuse to import ambiguity into a policy of insurance. An effort toward that end was made and frustrated in *Greenberg v. Continental Casualty Co.*, 24 Cal. App. (2d) 506 (hearing in Supreme Court denied). There, the word "insurability" was involved. The Court held:

> With regard to the first decisive question above mentioned, there is no merit to the claim that the word "insurability" is ambiguous, unless it be charged that the English language is hopelessly inadequate and insufficient to express human thoughts. Indeed, the word is so simple—constructed as it is just as hundreds of other words are constructed—that its derivation scarcely warrants attention . . . The word insure, in Webster's New International Dictionary, second edition, is defined as, "to assure against a loss by a contingent event, on certain stipulated conditions, or at a given rate or premium; to give, take, or procure an insurance on or for; to enter into, or carry, a contract of insurance on" (p. 514).

The Court concludes:

> The word is in general use, and has but one meaning which is in no sense technical. Neither by definition nor by rule can its meaning be restricted to signify only "good health." The contracting parties must be assumed to know the English language, at least the common words,

> otherwise the courts would be continually called upon to define and interpret words, the definition and meaning of which can be found in every authoritative English dictionary. Because of the failure of the authorities relied upon by appellant to recognize this simple truth, namely, that the word "insurability" is not ambiguous, the reasoning followed in such cases is logically unsound. To assume, as those authorities do assume, that the word is ambiguous is to adopt a false premise, and, from the standpoint of logic, to proceed with argument from a false premise can lead to but one conclusion, namely, a conclusion that is logically unsound (pp. 514-15).*

In *Coit v. Jefferson Standard Life*, 28 Cal. (2d) 1, a war risk exclusion rider was involved. It provided that there should be no recovery, except return of premiums in case of death occurring "from any cause while the insured is serving outside the states of the United States . . ." (p. 3).

This clause was held to apply to death in Alaska of a member of the armed forces resulting from an embolism following an appendectomy. The opinion declares:

> We are satisfied (that) paragraph 2 is free from any ambiguity or uncertainty, and that it means precisely what it says (p. 4).

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*In a subsequent decision the Supreme Court of California stated that the decision in the *Greenberg* case was correct, but disapproved the ruling on another point involving the duty of the insurance company to avoid arbitrary action in considering evidence as to insurability. As to the factor of ambiguity, the *Greenberg* case has never been questioned (*Kennedy v. Occidental Life Ins. Co.*, 18 Cal. (2d) 627, 634-5).

Then, after analyzing the clause, the opinion says:

> This seems to be the plain and natural meaning of the language (p. 4).

Section 1644 of the Civil Code of California declares:

> The words of a contract are to be understood in their ordinary and popular sense.

Hence, there can be no doubt but that the California courts would give the same interpretation to this policy as it has received from the Circuit Court of Appeals, one of whose members and the author of the opinion—Judge Denman—had during long years of practice which preceded his judicial appointment attained an outstanding position as a member of the California bar.

Petitioner refers (brief, page 33) to the principle that an insurance policy "susceptible of two constructions" will be interpreted in favor of the beneficiary. This is the rule in California. But, as above appears, the double-indemnity clause is clear and unambiguous.

One other ground is advanced by the petitioner in her effort to forecast the views of the California courts on this issue. This is based on *Trueblood v. Maryland Insurance Co.*, 129 Cal. App. 102.

The policy in the Trueblood case contained no requirement of any manifestation whatever as evidence of the injury. Hence, the case has no bearing on the question at bar.

As originally printed, petitioner's brief (page 31) referred to the Trueblood opinion as "not disclosing whether the contusion or wound limitation was one of the policy's terms."

Later, the petitioner corrected the text so as to read:

> In an opinion not involving the contusion or wound limitation as one of the policy's terms. . . .

That is the fact. There was no contusion or wound requirement in the Trueblood policy. Hence, the California Court held that no contusion or abrasion was necessary to recovery.

Obviously, a decision based on a policy that contains no such requirement does not indicate that the Court would render a similar decision with respect to a policy in which a contusion or wound is required as evidence of the injury.

When the petitioner discovered her mistake concerning the contents of the policy in the Trueblood case, she should have realized that the decision is of no value and abandoned the contention based upon it. Since she has not done so, we shall answer the remainder of petitioner's argument on the point.

Petitioner (brief, pages 32-33) points to the fact that the *Trueblood* case cites *Horsfall v. Pacific Mutual,* 72 Pac. 1028 (Wash.). But the point of the citation is not concerned with the contusion or wound aspect. It involves another and independent issue, viz.: whether acute dilatation of the heart "as a direct result of accidentally falling into a whirlpool of

water" (129 Cal. App. 108) made a case of accidental means.

It is in this connection that the Trueblood opinion cites the *Horsfall* case which also involved a dilatation of the heart (see 129 Cal. App. 108).

The Horsfall policy contained an exception clause providing that "this insurance does not cover . . . injuries . . . of which there are no visible external marks upon the body . . ."

The *Horsfall* opinion discusses the meaning of this clause. But this discussion is not mentioned by the California Court in the *Trueblood* case for the obvious reason that the subject is immaterial to any issue involved in the *Trueblood* case.

Because the California Court cites a decision with respect to one material aspect does not result in the approval or adoption of other and immaterial aspects of the cited authority.

Furthermore, the exception clause in the Horsfall policy did not require a contusion or wound. It excluded coverage if there were "no visible external marks upon the body." The difference is clear. It is explained at length in the Stanfield opinion (151 Fed. (2d) 776) quoted in the appendix to this brief; also in *Travelers v. Ansley,* 124 S. W. (2d) 37, 41-42 (Tenn.).

Petitioner also cites *Hill v. Great Northern Life,* 58 Pac. (2d) 405 (Wash.). There again, according to the policy "marks or evidences of injury" sufficed as well as a contusion or wound. As petitioner's brief

(page 32) discloses, the clause in the Hill policy excluded coverage of injuries "of which there shall be no visible contusion, wound, *or other marks or evidence of injury* on the exterior of the body" (p. 406).

We conclude that all indications found in the California decisions point to a concurrence with the view of the Circuit Court of Appeals in its interpretation of the double-indemnity clause at bar.

11. There was no conflict of evidence on the issue of contusion or wound and, therefore, the determination of the issue was for the Court.

The petitioner contends that the jury decided an issue of fact and, therefore, the Appellate Court was bound by the finding that the injury was evidenced by a contusion or wound.

The answer is that there was no conflict in the evidence. Authority for this statement is found in five of the six cases cited above in section 8 of this brief. In four of the cases, judgment in the trial Court was for the beneficiary. It was reversed on the ground that there was no evidence to support the finding of contusion or wound. In one case—*Paist v. Aetna Life,* 60 Fed. (2d) 476 (C.C.A. supra)—a judgment for the insurance company on a directed verdict was affirmed.

The physical facts are undisputed. The only question is whether they satisfy the policy requirement. That question must be determined by the Court. The Circuit Court's opinion states:

> Appellee gave no evidence of any wound and we think none of a "contusion" (Tr. p. 298).

The burden was on Mrs. Savage to show that the injury was so evidenced. She produced no such evidence. Hence, there was no escape from a judgment for the company notwithstanding the verdict. As the Circuit Court's opinion states:

> Our conclusion that appellee's burden of proof of contusion has not been sustained by the evidence of pallor and blue lips is in accord with the decision on the identical facts in the case of Paul Revere Life v. Stanfield (C.C.A. 10), 151 F. 2d 776, 777, where the court construed the same policy provision (Tr. p. 301).

The petitioner misconceives the situation. She propounds the question:

> May an Appellate Court arrive at a conclusion opposite to that of the jury simply and exclusively by reliance upon expert opinion testimony as to the meaning of wording in the policies . . . (petition, p. 8).

The Circuit Court's decision is not based "simply and exclusively" on expert testimony. It is based on the absence of any evidence to justify recovery by Mrs. Savage.

In referring to the medical testimony, the Circuit Court says that it "corresponds with the dictionary definitions" (Tr. p. 300).

Petitioner's quotation (brief, pp. 22-23) from the medical testimony is incomplete. She omits the most significant portion which is set forth in the Circuit Court's opinion, viz.:

> A. Blueness of the skin is a result of the oxygen content of the blood—veinous blood is

blue and the oxygenized blood is red. When the heart action is insufficient and the blood is not pumped properly and sufficient oxygen does not enter the blood, that imparts a blue color or character to the skin, the blood becomes blue, and that imparts the color to the skin. There is no damage and there is no wound or contusion.

Q. Is there any damage to the subcutaneous tissue?

A. There is not.

Q. In the case of pallor is there any damage to the subcutaneous tissue?

A. There is not.

Q. In case of pallor is there any effusion of blood beneath the skin?

A. No.

Q. In case of blue lips is there any effusion of blood beneath the skin?

A. No (Tr. p. 300).

This testimony was properly admitted. It is a scientific explanation of the symptoms. Not only was it uncontradicted, as the Circuit Court points out, but it is obviously not open to contradiction.

This testimony does not convert the issue into a jury question. It corroborates the Circuit Court's conclusion that there was no evidence of a contusion or wound.

12. The Circuit Court properly directed entry of judgment for the insurance company.

Defendant (respondent here) moved for judgment n. o. v. (Tr. p. 23) and seasonably specified as error the District Judge's denial of the motion (Tr. p. 49, paragraphs 1 and 2; Tr. p. 292). Among the grounds

specified was the absence of evidence of a contusion or wound.

This subject was investigated in depositions, by interrogatories under Rule 33, at the pre-trial conference, and finally at the trial.

On each of these occasions the inadequacy of the manifestations was pointed out and it was brought into even sharper focus when appellant moved for a directed verdict, and thereafter for judgment n. o. v. If the petitioner had anything to add to her case, she would have done so when the opportunities were thus presented.

The petitioner had ample opportunity to produce medical testimony explaining the symptoms, if any favorable testimony on that point had been available. The petitioner relied heavily in the trial court on the *Warbende* case (97 Fed. (2d) 749, supra) where the decision was based on medical testimony concerning the manifestations there involved. The petitioner had a medical expert in court who gave testimony on the issue of accident and whose silence on the contusion issue shows that he could not assist petitioner in that respect.

That the District Judge was unable correctly to determine the issue should not be made the basis for requiring a second trial. Such a trial would result in a directed verdict for the defendant and, therefore, no good purpose could be served by postponing the inevitable outcome, and delaying the final disposition of the case.

The propriety of the mandate directing judgment for defendant is supported by the cases cited in the opinion (Tr. p. 301). It is in accord with the recent decision of the Supreme Court (*Clone v. Virginia Pulp Co.,* 91 L. Ed. Adv. Op. 683) where the power to direct a judgment was denied because of the failure of the appellant to present a motion for judgment n. o. v. Here, such a motion was made and, therefore, the Circuit Court's power is beyond question.

It is also noteworthy that in one of the cases cited by the Circuit Court (Tr. p. 301)—*Connecticut Mutual Life v. Lanahan,* 113 Fed. (2d) 935—the same procedure occurred as in the case at bar. The original judgment of the Circuit Court reversed and remanded the cause for a new trial. Then on application of the insurance company, the mandate was amended so as to direct entry of judgment for the company.

Accordingly, we submit not only that no ground for certiorari has been presented, but that on its merits the decision of the Circuit Court is correct.

Dated, San Francisco, California,
July 3, 1947.

Respectfully submitted,
DAVID LIVINGSTON,
LOUIS F. DIRESTA,
Attorneys for Respondent.

(Appendix Follows.)

EXTRACTS FROM OPINIONS HOLDING THAT MANIFESTATIONS SIMILAR TO OR MORE EXTENSIVE THAN THOSE IN THE CASE AT BAR DO NOT CONSTITUTE A CONTUSION OR WOUND.

Paul Revere Life Insurance Co. v. Stanfield, 151 Fed. (2d) 776.

> The deceased became pale and remarked that he felt a "hot spell or something" coming over him; he immediately went to bed; his clothes were wet with perspiration; he complained of smothering to death and of pains in his arms; his face was a pale yellow color and his lips were blue and swollen; the pupils of his eyes were dilated, and his eyes were glassy; he vomited blood practically the entire time, and hot fluid flowed from his nose; and just before death occurred his "skin had turned blue practically all over his body."
>
> Do any of these symptoms constitute a visible wound or contusion upon the exterior of the body? We think they do not. Many of the cases upon which appellee relies to sustain the judgment are not helpful because the proviso considered therein was quite different from the one in question here. They arose under provisions which required a visible mark or evidence of injury, or language meaning substantially that. Under such proviso we would have no difficulty in concluding that there were visible marks and evidence of an injury. But this proviso requires a wound or contusion on the exterior of the body. A number of courts have considered similar provisos where the facts were substantially the same,

and as in many such cases, have reached different conclusions. In Wiecking v. Phoenix Mutual Life Ins. Co., 7 Cir., 116 F. 2d 90; Huss v. Prudential Ins. Co. of America, D. C., 37 F. Supp. 364; American Nat. Ins. Co. v. Fox, Tex. Civ. App., 184 S. W. 2d 937, and Warbende v. Prudential Ins. Co. of America, 7 Cir., 97 F. 2d 749, 117 A. L. R. 760, the courts held that substantially the same facts met the requirements of similar provisos in the policies, while in Paist v. Aetna Life Ins. Co., D. C., 54 F. 2d 393, affirmed 3 Cir., 60 F. 2d 476; Pope v. Lincoln Nat. Life Ins. Co., 8 Cir., 103 F. 2d 265; Dupee v. Travelers Ins. Co., 278 N. Y. 659, 16 N. E. 2d 391, and Travelers Ins. Co. v. Ansley, 22 Tenn. App. 456, 124 S. W. 2d 37, the courts held similar facts insufficient to meet the requirements in similar provisos.

The parties were free to make their own contract, and it is our duty to give effect thereto. Where language is clear and unambiguous and has a well defined meaning, the presumption must be that the parties used such words in their ordinary and well understood meaning. Courts are not justified in adopting strained or technical or unnatural definitions of words in order to swing the pendulum one way or the other.

The words "wounds" and "contusions" have well defined, generally accepted and understood meanings. The commonly understood and accepted meaning of the word "wound" is an injury to a person in which the skin or other membrane is broken, as by violence or surgery. See Travelers Ins. Co. v. Ansley, supra; Webster's New International Dictionary, Second Edition. These au-

thorities, as well as others, likewise define "contusion" as a bruise affecting subcutaneous tissue, without breaking the skin. "Contusion," in its ordinarily accepted meaning, is synonymous with "bruise." It is difficult to think of pallor, perspiration, dilated pupils, or a bluish tint to the skin immediately preceding death as either wounds or contusions. To so hold would, in our opinion, do violence to the ordinarily accepted meaning of these terms as they are understood by intelligent persons.

We think it must be presumed that when the parties used these terms in their contract, they used them as they are commonly and ordinarily understood. In the absence of any guidance from the Supreme Court of Oklahoma we choose to follow those decisions which hold manifestations such as outlined above insufficient to constitute a wound or contusion upon the exterior of the body. The judgment of the trial court is reversed and the cause is remanded, with directions to enter judgment for the defendant. (p. 777).

Paist v. Aetna Life, 60 Fed. (2d) 476.

In its opinion the court below said: "I am also of the opinion that there is no evidence in this case of a visible contusion or wound upon the exterior of the body. To hold that a flushed, sunburned face is a wound or contusion would be straining language far beyond any reasonable meaning which could be assigned to it. It might be just possible to bring it under the definition of wound given by the Century Dictionary as the meaning of the word in medical jurisprudence and cited by the plaintiff, but in insurance poli-

cies courts have again and again refused to adopt technical definitions and have adhered to the ordinary and popular meanings of words used. There is no reason why this rule should not work both ways. Certainly in ordinary parlance 'contusion' is almost exactly synonymous with 'bruise', and to say that a flushed countenance is a wound would go beyond the limit of allowable interpretations." 54 F. (2d) 393, 395.

We find no error in such view. We are here dealing with a written contract in which the parties agreed that the accident against which the insured was indemnified was one "evidenced by a visible contusion or wound on the exterior of the body." These words "contusion", "wound", "visible on the exterior of the body", are of well-known commonly understood meaning. "Contusion," which has its Latin origin, "con" and "tundere", to strike, means a bruise or wound caused by a blow, but where, as here, no physical blow is struck, where there is no bruising, where the skin is not blow-bruised or blow-broken, certainly, in common speech and common understanding, the death of the plaintiff's husband from sunstroke cannot be said to be "evidenced by visible contusion or wound on the exterior of the body". (p. 477)

Travelers Insurance Co. v. Ansley, 124 S. W. 37.

In no view of the question do we think it can be said that the fact that the insured "went into a deep sleep", or the fact that "his mouth flew open and he snored", was a "contusion or wound" evidencing the injury which resulted in the insured's death. So, if the plaintiff's view be

sustained it must be on the theory that the pallor of his face, coupled with the fact that his head "was drawn back", met the requirements of the policies in this respect.

There is some justification for the conclusion that such a condition is an external "sign or mark" within the meaning of a policy provision employing those terms in the connection here under consideration and it appears to have been expressly so held. Note: 39 A.L.R. 1011. But we think to hold that it was a "wound or contusion" would be a clear perversion of the ordinary meaning of plain language. If the coverage had been limited to death from an injury of which there was no visible and external wound or contusion, as could have been done had the parties so desired, and the insurer was here defending on the theory that the pallor of the insured's countenance and his drawn head was a "wound or contusion", it can readily be imagined the dispatch with which it would be repelled on the ground that no such strained and unnatural construction of language would be permitted because clearly not intended by the parties when they employed the terms. This being true, the result must be the same where the resort to such a construction is by the insured rather than the insurer, for obviously the terms of the policies cannot be said to have meant one thing in regard to the latter and another in regard to the former. They must have meant the same to both the parties; otherwise there would have been no contract.

The rule which forbids the imputation of an unusual meaning to language used in an insurance

or other contract applies as well when invoked by one party as by the other. In cases involving insurance policies its application does not depend upon which of the parties, whether insured or insurer, will benefit by the result. Great Eastern Casualty Co. v. Solinsky, supra.

The words "contusion" and "wound" involved in the instant case are of well known, commonly understood import (Paist v. Insurance Co., supra) which must be given effect. There is, we think, no reasonable basis for the view that a pallid face and drawn head are within that meaning. We think the average person would be amazed to hear that any such significance could be ascribed thereto. To say that such a condition was a wound or contusion would be an excellent illustration of a strained and unnatural construction of terms having a common, ordinary meaning and which were obviously used in that sense. Paist v. Ins. Co., supra; see also: Lavender v. Ins. Co., 171 Miss. 169, 157 So. 101. (pp. 42-3).

Travelers v. Ansley, 173 S. W. (2d) 702.

Reverting to the facts of the case at bar, apart from the scratch on the insured's leg, the condition relied upon as constituting a wound or contusion was that just prior to his death the insured's face was pale and his lips were somewhat swollen and blue. We do not think either condition was within the common, ordinary meaning of the words "wound or contusion." A pale face and swollen, blue lips might be regarded as indicating, and as a sign of, an internal disorder or even an injury, but we cannot conclude that either is of itself a wound or contusion

within the ordinary meaning of those words, especially in the absence of any expert evidence on the point. Incidentally, the record before us furnishes very good proof that this is true, so far as laymen are concerned. For instance, the plaintiff was asked by her counsel if she saw any wound or cuts or contusions on him anywhere, and she replied "No." Another lay witness, Mr. Tapp, who also undertook to testify as to the conditions on the exterior of the body, was asked, "Did you see any contusion or wound on him anywhere?" to which he responded, "No sir." It is fair to assume from their testimony and station in life that these witnesses were in fact above the average in intelligence, and that they understood the ordinary meaning of the words "wound and contusion". It is perfectly clear that it never occurred to either that the conditions relied upon as meeting the policy requirement were within the ordinary meaning of these words, or either of them. Their conclusion is of course not binding on us. We refer to it only as indicating the understanding of the ordinary layman with respect to the meaning of the words. In this connection it is worth noting that the plaintiff did not ask the attending physician, whom she introduced, whether there was a wound or contusion on the exterior of the body. (p. 705).

Dupee v. Travelers Insurance Co., 16 N. E. (2d) 391 on appeal.

The evidence disclosed that insured died from sunstroke with an acute heart condition as a secondary cause of death. . . . On July 2d, which was a hot humid day, he was on his way home

in an automobile at about 4:30 in the afternoon. He fainted in the automobile and was taken to a hospital, where he was treated for sunstroke, and died the next day. The insured's face and head were very red, redder than usual, and his face was somewhat swollen. The doctor who treated the insured testified that sunstroke or sunburn is a first degree burn, and that "inasmuch as a burn is considered a wound, and sunburn is considered a burn, it must be considered a wound". The defendant claimed that there was no proof that the death was caused in a manner contemplated by the contract.

From a judgment of the Appellate Division, 253 App. Div. 278, 2 N.Y.S. 2d 62, which reversed an order of the Appellate Term, vacated a judgment of the City Court and dismissed the complaint on the ground that there was no evidence of a visible "contusion" or "wound" on the exterior of the body of the insured within the additional indemnity contract of the life policy, plaintiff appeals after his motion for reargument was denied, and his motion for leave to appeal to the Court of Appeals was granted by the Appellate Division, 254 App. Div. 566, 3 N.Y.S. 2d 901.

Affirmed. (pp. 391-2)

Dupee v. Travelers Insurance Co., 253 App. Div. 278, 2 N. Y. S. (2d) 62.

As to whether or not there was a visible contusion or wound on the exterior of the body, the testimony is that the insured's face and head were very red, redder than usual, and his face was somewhat swollen. The doctor who treated

the insured testified that sunstroke or sunburn is a first degree burn; and further "Inasmuch as a burn is considered a wound, and sunburn is considered a burn, it must be considered a wound."

On cross-examination the doctor testified:

"Q. You just testified that he had a sunburn, first degree? A. Yes.

Q. That is the mildest kind of a burn, is it not? A. Yes.

Q. It is just a redness that all of us experience when we are out in the open and the sun rays beat down upon us in the summer time? A. Yes.

Q. You didn't see any visible cut or wound, did you? A. No.

Q. And the skin was not broken? A. No."

Another physician, testifying as an expert, gave an opinion that sunburn is considered a first degree burn, and a first degree burn is medically considered a wound. (p. 64)

The Court held that such evidence did not satisfy the requirement of the policy:

> There does not appear to be in any jurisdiction a decision which holds that the effects of sunstroke constitute proof of "a visible contusion or wound on the exterior of the body". On the medical testimony in this action it could be found that doctors would consider sunburn a wound", but the courts have stated repeatedly that the language in insurance policies is not to be construed like words of art, but is to be given such meaning as the average policy-holder, as well as the insurer, would attach to it. Paist v. Aetna Life Insurance Co., 3 Cir., 60 F. 2d 476,

477; Johnson v. Travelers' Insurance Co., 269 N. Y. 401, 407, 408, 199 N. E. 637; Abrams v. Great American Ins. Co., New York, 269 N. Y. 90, 92, 199 N. E. 15. (p. 64)

. . . . . .

The most reasonable and unstrained construction of the policy in suit therefore, would seem to be that it does not contemplate that a very red face and head, with the face somewhat swollen, is evidence of a visible contusion or wound on the exterior of the body. I think this conclusion must be accepted, notwithstanding that the courts are disposed to construe policies of insurance liberally and most favorably to beneficiaries, and that there are decisions that have permitted recoveries in cases where no mark visible to the eyes was left on the body. These cases, however, do not involve sunstroke, nor was there a specification in the contracts that there be "a visible contusion or wound on the exterior of the body"; and the nature and extent of the holdings have been explained in Rosenthal v. American Bonding Co., 207 N. Y. 162, 100 N. E. 716, 46 L.R.A., N. S. 561. (p. 65)

Bender v. Ridgley Protective Assn., 257 N. Y. S. 1004, affirmed 262 N. Y. 685, 188 N. E. 120.

The policy has been erroneously construed. It clearly covers death and disability cases of one character only, viz., those wherein the injuries are solely those caused both accidentally and through causes not only violent, external and involuntary, but those leaving visible marks of wounds, fractures or dislocations upon the body of the insured. No such injuries were proved. (p. 1004)

Lavender v. Volunteer State Life Ins. Co., 157 S. 101.

> A careful examination of the body of the said Lavender disclosed no evidence of the injury sustained in the scuffle, such as wounds or contusions on the exterior of the body, except that immediately upon reaching home and within a few minutes after the tussle the said Lavender became nervous and *began to turn pale;* that within two hours thereafter he turned *deathly pale* and became very sick; that his facial expression reflected that he was suffering from intense pain and his body was drawn from pain; that he lay down and soon became unable to arise; that two physicians were immediately called and after attempting for several hours without effect to ease the pain, decided to perform an operation to locate the trouble, and after making an incision found his abdomen filled with blood from a ruptured spleen, the same being torn almost in two; that the spleen was in such a ruptured condition it had to be removed, and almost bled to death internally from the wound, a blood transfusion was performed in a futile effort to save his life; that within four days after the injury the said Lavender died. . . . (p. 103)
>
> . . . . . .
>
> From the agreed statement of facts, it will be seen that there was no stipulation that there was any wound or contusion visible upon the body of Lavender, and that it required an operation to determine what the injury was. (p. 104)

PERTINENT PORTIONS OF THE OPINION IN WARBENDE v. PRUDENTIAL, 97 FED. (2d) 749.

Warbende v. Prudential Insurance Co. of America (C.C.A. 7th), 97 F. (2d) 749:

The evidence discloses that there were scarlet blotches on the skin of the face and on the trunk and extremities of the deceased, and that these scarlet blotches were characteristic of carbon monoxide poisoning. The blotches constituted visible marks on the exterior of the body and were evidence that the bodily injuries, which resulted in death, were effected by carbon monoxide poisoning. But the defendant contends that the scarlet blotches were not contusions or wounds within the meaning of those words as used in the policy. In the case of Mutual Life Insurance Company v. Schenkat this court had occasion to construe the words "contusion or wound" in an accidental death provision which required that there be "evidence by a visible contusion or wound on the exterior of the body." In that case death had been caused by sodium fluoride poison. The stipulation of facts recited: "* * * lips and tongue swollen; became pale; body discolored, * * *" This court concluded that the foregoing physical marks satisfied the requirement of "evidence by visible contusion or wound on the exterior of the body."

In reaching such conclusion this court cited and quoted with approval from the case of Thompson v. Loyal Protective Association. In the policy which was involved in the Thompson case there was a provision that "* * * the injury includes only the result of external violent and accidental means leaving on the body marks of contusions or wounds visible to the naked eye." The trial

court had instructed the jury that in legal medicine the word "wounds" meant "injuries of every description that affect either the hard or soft parts of the body," and that it comprehended "bruises, contusions, fractures, luxations, etc.," and that "in law the word means any lesion of the body." The Supreme Court of Michigan held that the trial court's instruction correctly stated the meaning of the word "wounds." And it appears from the facts of that case that the contusion or wound consisted of a "discoloration of the skin, swelling and redness over the right kidney and hip;" and there was no contention that the "contusion or wound" was caused by the impact of any solid body upon the body of the deceased.

It is true that "contusion," etymologically considered, suggests an injury which is the result of the impact of a blow upon the exterior of the body. But for the purpose of our present inquiry the meaning cannot be so restricted. It is obvious that the purpose of requiring that there be a "visible contusion or wound on the exterior of the body" is to have visible, physical evidence of the operation of the "external, violent and accidental means," which are alleged to have effected the bodily injuries. In our opinion "visible contusion," as used in the policy, includes any morbid change in, or injury to, either the subcutaneous tissue, or the skin, which produce markings or discolorations that are visible upon the exterior of the body. It is not material whether the "visible contusions" result directly from the operation of the "means" upon the exterior of the body, or indirectly from internal injuries which are effected by the action of the "means". "The acci-

dental operation of external means may be wholly internal," and yet the internal injuries may extend to the subcutaneous tissue or into the layers of the skin. The visibility of the "contusion" may be due to the discoloration either of the injured tissue under the skin, or of the injured skin itself, or of both.

The scarlet blotches which were upon the exterior of the body of the insured were caused by the action of the carbon monoxide and were connected with the "internal injuries" which resulted in the death of the insured. When carbon monoxide is inhaled into the lungs it passes into the blood and combines with the hemoglobin contained in the red blood cells and cuts off the supply of oxygen to tissue cells. According to medical testimony the scarlet blotches were the result of death and decomposition of tissue cells, the death and decomposition of the cells resulting from the absence of oxygen in the red blood cells.

The Supreme Court of Illinois has had occasion to discuss and define the word "wounds." It was stated in the opinion that "in law the word means lesion of the body, and the correct definition of a lesion is a hurt, loss or injury." The word "lesion" is defined in Webster's New International Dictionary as "Any morbid change in the structure of organs or parts; hence the diseased or injured region." The Illinois Supreme Court's definition of "wound" excludes the necessity of a breaking or cutting of the skin and is broad enough to include an injury to the subcutaneous tissue and to the skin, which has resulted from carbon monoxide poisoning and is revealed by scarlet blotches.

We are of the opinion that the scarlet blotches were visible contusions or wounds within the intent and meaning of the accidental death provisions in the policies. (pp. 752-3)

ANALYSIS OF CASES CITED IN PETITIONER'S BRIEF (PAGES 29-31) IN SUPPORT OF THE CONTENTION THAT THE MANIFESTATIONS AT BAR CONSTITUTE A CONTUSION OR WOUND.

Robinson v. Masonic Assn., 88 Atl. 531 (Vt.):

The manifestations were as follows:

> The finger was badly swollen, inflamed, and reddened. It grew worse steadily, and a frog felon of the most severe kind developed (page 531).

These symptoms would probably suffice under the modern contusion and wound clause. The Court held that the word "wound . . . includes the bruise of the plaintiff's finger . . . and that the felon constituted 'external and visible marks' of the wound" (page 532).

Furthermore, as the above extract discloses, the clause merely required "external and visible marks of a wound" (page 531) which is far different from the policy at bar.

Thompson v. Loyal Protective Assn., 132 N. W. 554 (Mich.):

Policy provision: Injury includes only the result of external, violent and accidental means leaving on the body *marks of contusion or wounds visible to the naked eye* (pp. 554-5).

Under such a provision, the contusions or wounds themselves need not be visible or be on the exterior of the body. It is only required that the marks of the contusions or wounds be visible. The mark need not be a contusion or wound. Hence, the wound may be internal, provided there is an outward mark of such wound.

Manifestations: Discoloration of the skin, swelling, and a redress over the right kidney and hip (p. 555).

Such symptoms did in fact constitute marks of contusions or wounds.

People v. Durand, 139 N. E. 78 (Ill.):

The case was a criminal case—a prosecution for murder. It did not involve the interpretation of a visible wound and contusion clause of an insurance policy.

Furthermore, the victim suffered a wound in every sense of the word. The Court enumerates the manifestations of his injury as follows:

> His skull was fractured and slightly indented and there was a cut and bruise over the fracture. The cut and bruise and fracture were the only wounds on the body according to the testimony of the physicians. (p. 80)

American National v. Fox, 184 S. W. (2d) 937 Texas):

Here the Court decides that in case of accidental injury double indemnity must be paid if the manifes-

tation ordinarily attending that particular injury is present. In other words, even though there is no contusion or wound, the company must pay—simply because the particular accidental injury does not ordinarily produce a contusion or wound.

If the reasoning of the *Fox* case is carried to its logical conclusion, then in a case of accidental injury in which no physical manifestation ordinarily appears, the courts could dispense with the contusion or wound requirement altogether.

For example, a fatal overdose of sleeping tablets may produce death during sleep without any external symptom whatever except that ordinarily attendant on death itself. The victim just does not wake up. Suppose that a policyholder picks the wrong bottle out of his medicine chest, and thinking he is taking some harmless pills to relieve indigestion, swallows several sleeping tablets with fatal results. This is accidental death. But there is no contusion—there is no manifestation of any kind. Could any court justifiably decide that none is necessary to authorize recovery because sleeping tablets do not ordinarily produce any such manifestation on the exterior of the body? Certainly not. To do so would arbitrarily ignore the contusion requirement and radically enlarge the policy coverage.

The *Fox* case is a typical example of the attitude of some courts which seize on any conceivable ground to decide against insurance companies.

The double indemnity clause provides coverage in addition to the life insurance. The clause says in sub-

stance: Only death from a cause which produces a contusion or wound is covered. If a sunstroke (or heart attack) does not produce such a manifestation, then it is not a risk calling for double payment, even though death results from accidental means.

But the Texas court sweeps this aside and says to the insurance company: "If according to our view the particular death is accidental, we will require you to pay double indemnity and we care not what restrictive provisions to the contrary you have incorporated in your policy".

Cavallero v. Travelers, 267 N. W. 370 (Minn.): The clause in this case was in the form of an exception. There was a large variety of exceptions, and one of them was as follows:

> 22. This insurance shall not cover disappearance nor injuries of which there is no visible contusion or wound on the exterior of the body of the insured. (267 N. W. 371.)

On this ground the Minnesota Court held:

> Policy provisions limiting coverage, or excepting the insurer from liability under certain conditions, are to be strictly construed as to the insurer and liberally construed as to the insured. (p. 372)

Pursuant to this principle, the Court expressed the opinion that this clause could be interpreted "in harmony with the construction placed on provisions construing what constitutes visible signs or marks of injury on the exterior of the body" (p. 372).

We need not speculate as to whether the Court would have entertained the same view if it had been dealing with a clause providing coverage, instead of an exception. The contrary decisions in the *Stanfield* and *Ansley* cases—involving a clause identical with that at bar—should be followed here. The first Ansley appeal discusses the *Cavallero* case and points out its fallacies (see Appendix, supra).

Lewis v. Brotherhood, 79 N. E. 802 (Mass.):

This case is not concerned at all with the sufficiency of manifestations to satisfy the contusion or wound clause. The question there was whether the policy required a contusion or wound in case of drowning. There were two conflicting clauses on the subject. So the Court resolved the conflict in favor of the insured. And in doing so, the Court pointed out that there would be little logic in requiring a wound in a case of *drowning.*

Hill v. Great Northern Life, 57 Pac. (2d) 405 (Wash.):

There the clause was an exception excluding coverage unless there were contusions or wounds "or marks or evidence of injury" (p. 406). Hence, the policy was radically different from that at bar.

Masonic Assn. v. Campbell, 245 S. W. 307 (Ark.):

There was evidence "that there was an observable bruise and discolored condition of Formsby's toe . . . and that the place suppurated and broke" (page 308).

These symptoms clearly sufficed under a clause requiring "visible marks of contusions and wounds" (page 308).

PROVISIONS OF THE CALIFORNIA HEALTH CODE CITED IN THE FOREGOING BRIEF.

Section 10375:

The certificate of death shall contain the following items, and such other items as the department may designate:

. . . . . .

(22) Certification as to action of the coroner when compelled to act by law, stating kind of action taken, whether inquest, autopsy or inquiry, and the fact and cause of death.

Section 10400:

The medical certificate shall be made and signed by the physician, if any, last in attendance on the deceased except in the following cases:

. . . . . .

(c) Where death is the result of an accident.

(d) Where an injury is a contributing cause of death.

Section 10425:

The certificate of death shall be made by the coroner in case of any death occurring under any of the following circumstances:

. . . . . .

(e) Where the deceased person died as the result of an accident.

Section 10551:

Any photostatic copy of the record of a birth, death, or marriage, or a copy, properly certified by the State or local registrar to have been registered within a period of one year from the date of the event is prima facie evidence in all courts and places of the facts stated in it.